

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)	
Fair Isaac Corporation,)	File No. 16-cv-1054 (DTS)
a Delaware Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
Federal Insurance Company,)	Courtroom 14W
an Indiana corporation,)	Minneapolis, Minnesota
and ACE American Insurance)	Tuesday, March 7, 2023
Company, a Pennsylvania)	8:57 a.m.
Corporation,)	
)	
Defendants.)	
)	

BEFORE THE HONORABLE DAVID T. SCHULTZ
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

(JURY TRIAL PROCEEDINGS - VOLUME XII)

Proceedings recorded by mechanical stenography;
transcript produced by computer.

* * *

APPEARANCES:

For Plaintiff:

MERCHANT & GOULD P.C.
BY: ALLEN W. HINDERAKER
HEATHER J. KLIEBENSTEIN
PAIGE S. STRADLEY
MICHAEL A. ERBELE
JOSEPH W. DUBIS
GABRIELLE L. KIEFER
150 South Fifth Street, #2200
Minneapolis, Minnesota 55402

For Defendants:

FREDRIKSON & BYRON
BY: TERRENCE J. FLEMING
LEAH C. JANUS
CHRISTOPHER D. PHAM
RYAN C. YOUNG
PANHIA VANG
200 South Sixth Street, #4000
Minneapolis, Minnesota 55402

O'MELVENY & MYERS LLP

BY: LEAH GODESKY
ANTON METLITSKY
DARYN E. RUSH
ROXANA GUIDERO
Times Square Tower
7 Times Square
New York, New York 10036

Court Reporters:

RENEE A. ROGGE, RMR-CRR
KRISTINE MOUSSEAU, CRR-RPR
MARIA V. WEINBECK, RMR-FCRR
PAULA RICHTER, RMR-CRR-CRC
United States District Courthouse
300 South Fourth Street, Box 1005
Minneapolis, Minnesota 55415

* * *

I N D E XPAGE**PHILIP FOLZ**

Direct Examination By Ms. Godesky	2397
Cross Examination By Mr. Hinderaker	2427

NEIL ZOLTOWSKI

Direct Examination By Ms. Kliebenstein	2443
Cross Examination By Ms. Godesky	2456
Redirect Examination By Ms. Kliebenstein	2465

DEFENDANTS' EXHIBITSREC'D

58	2409
328	2423

AS READ BY THE COURT

PLAINTIFF'S EXHIBITS

2473

2, 5, 17, 18, 19, 20, 21 through 43 inclusive. 46, 47, 57, 60, 69, 73. 90 through 96 inclusive. 103, 105, 106, 107, 108. 110 through 113 inclusive. 116. 120 through 126 inclusive. 131, 133, 143, 144, 145, 147A, 151, 154A, 156, 158, 168, 171, 171A, 175, 176, 184, 185, 187, 188, 189, 191, 192, 193, 194, 195, 199, 204, 212, 216, 218, 226, 227, 282, 283, 284, 299, 303, 307, 309, 310, 311. 328 through 331 inclusive. 336, 337. 341 through 351 inclusive. 353 through 360 inclusive. 362 through 377 inclusive. 404A, 418, 504, 510, 511, 517, 518, 520, 521, 526, 527, 540, 576, 655A. 839 through 850 inclusive. 857, 870, 871. 873 through 897 inclusive. 948, 956, 958, 960, 1002A, 1004A, 1005A, 1007A, 1008A, 1073, 1088, 1090, 1112, 1113, 1114, 1116. 1139 through 1149 inclusive. 1151 through 1164. 1165, 1165A, 1171A, 1172A, 1174A. 1177 through 1181 inclusive.

DEFENDANTS' EXHIBITS

2472

4, 8, 12, 14, 17, 30, 39, 58, 67, 77, 92, 96, 97, 99, 108, 109, 110, 113, 114, 116, 118, 125, 155, 156, 169, 172, 196, 199, 200, 202, 207, 208, 209, 210, 211, 212, 263A, 276, 280, 282, 283, 284, 293, 304, 309, 328, 330, 343, 355, 356, 357, 358, 359, 360, 361 and 362

JOINT EXHIBITS

1 and 2	2478
---------	------

COURT'S EXHIBITS

1 and 2	2478
---------	------

1 March 7th, 2023 - 8:57 A.M.

2
3 **(In open court without the Jury present.)**

4 THE COURT: Good morning, everyone. Be seated.

5 All right. On the exhibit -- I've forgotten the
6 number of it. What is the number of it?

7 THE CLERK: P1180.

8 THE COURT: P1180. Should Mr. Hinderaker decide
9 to use it with Mr. Folz, I will allow it to be used. It
10 was produced by Federal in discovery. It's, unless I'm
11 missing it, frankly, not that critical a document. I don't
12 think it's terribly prejudicial.

13 MS. GODESKY: I will just state on the record
14 because I spoke to Ms. Solomon off the record.

15 You know, Mr. Hinderaker objected to our using
16 documents produced by FICO, license agreements that
17 Mr. Waid is quite familiar with, on the grounds that they
18 were disclosed during trial. So our position is just that
19 the rules of the road should apply equally to both parties.

20 THE COURT: Did I exclude those?

21 MS. GODESKY: You did. You told me I could only
22 use them for impeachment.

23 MR. HINDERAKER: And the rules of the road should
24 apply to both parties. And those documents that you
25 excluded, except for impeachment, were sent to us at

1 11:30 p.m. on the night before Mr. Waid was to continue his
2 testimony. So we got it while he was sequestered and got
3 them at 11:30 at night. These were given to the defendants
4 a few days ago, in fact, although we could anticipate
5 Mr. Folz testifying, it was before we were officially
6 noticed that he would.

7 THE COURT: Understood. Thank you, Counsel.

8 Everybody else ready to proceed?

9 MS. GODESKY: Yes.

10 THE COURT: Okay. And one last second before you
11 bring them in. Give me your current estimate how long with
12 Mr. Folz.

13 MS. GODESKY: 45 minutes to an hour for direct.

14 THE COURT: Okay. And then are you still about
15 45 minutes with Zoltowski?

16 MS. KLIEBENSTEIN: I hope I am well under 30.

17 THE COURT: Okay. Good.

18 THE CLERK: All rise for the jury.

19 **(Jury enters.)**

20
21 **(In open court with the Jury present.)**

22 THE COURT: Be seated.

23 Good morning, Members of the Jury. As I had
24 indicated yesterday, this will be the last day of
25 testimony. I'm hopeful that we will conclude that

1 testimony before the lunch break, and then I can send you
2 on your way. And then first thing in the morning tomorrow,
3 we will have instructions, final argument, and you will
4 begin your deliberations then. Okay?

5 All right. Ms. Godesky, call your witness.

6 MS. GODESKY: Your Honor, defendants call Phil
7 Folz.

8 THE COURT: Mr. Folz, come on up here, please.
9 If you will raise your right hand.

10 **(Witness sworn.)**

11 THE WITNESS: I do.

12 THE COURT: Go ahead and sit down. Turn your
13 microphone on, and speak into it, and state your full name
14 for the record.

15 THE WITNESS: My name is Phillip Folz.

16 **(PHILIP FOLZ)**

17 **DIRECT EXAMINATION**

18 BY MS. GODESKY:

19 Q. Good morning, Mr. Folz. Are you currently retired from
20 Chubb?

21 A. Yes, I am.

22 Q. When did you retire?

23 A. March 1st, 2018.

24 Q. For how many years did you work for Chubb?

25 A. 28 years.

PHILIP POLZ - DIRECT

1 Q. And what years were those?

2 A. 1990 up until March 2018. So January of 1990 through
3 March -- March 1st, '18.

4 Q. Is Chubb paying you by the hour to be here today?

5 A. No.

6 Q. Why are you here?

7 A. I heard about this case, and I was the individual who
8 actually negotiated the deal on behalf of Chubb and thought
9 my perspective would be important to hear on the case,
10 so --

11 Q. What was your title at Chubb at the time of your
12 retirement?

13 A. I was the Chief Information Officer for the commercial
14 lines division.

15 Q. And when we talk about commercial lines insurance, what
16 kind of insurance are we talking about?

17 A. So it's really insurance that is sold to businesses.
18 So it could be workers' comp. It could be commercial auto.
19 We had marine products, more general property casualty,
20 liability products, access umbrella. So a whole host of
21 products.

22 Q. What were your general responsibilities as the chief
23 information officer or CIO?

24 A. So I ran or I managed the technology aspect of the
25 commercial lines division, which meant that any technology

1 that commercial lines needed to support their business we
2 provided. Okay? In that more specifically, though, in
3 that role for the two years that I was in it, my primary
4 responsibilities were integrating the two organizations.
5 So Chubb was acquired by ACE, and we were integrating the
6 two organizations to become one.

7 Q. Were you managing a budget as the CIO?

8 A. Yes.

9 Q. How big a budget were you responsible for managing in
10 that role?

11 A. It was approximately 100 million dollars.

12 Q. Now, the jury has heard from architects who work at
13 Chubb. How is the role of an information officer different
14 from the role of an architect?

15 A. Yeah. So a chief information officer actually uses
16 input from architects and others in order to come up with
17 the technology strategies in order to support the business.
18 So the architects give you the technical aspects of what
19 we're trying to do and architect it. You get input from
20 other areas, you apply a cost element to it, and you come
21 up with a strategy as to how you're best going to support
22 the business goals of the underlying business that you
23 support.

24 Q. Now I want to take you further back in time to 2006.

25 What was your position at Chubb as of 2006?

1 A. 2006 I was the IT controller for the core IT division
2 within Chubb. And the core IT division was a set of
3 departments that provided a set of shared services and
4 technologies across all of Chubb.

5 Q. In the context of your work as a controller, what does
6 the term "cost allocation" mean?

7 A. So when we spend money on products being in a
8 centralized area, I needed to then allocate those costs out
9 to the areas that were benefiting from the use of those
10 products. It's cost allocation.

11 Q. And so cost allocation was part of your
12 responsibilities as the controller?

13 A. Yes, it was.

14 Q. Mr. Folz, did you provide deposition testimony in this
15 case where you walked in a conference room and provided
16 testimony under oath?

17 A. Yes, I did.

18 Q. You provided live deposition testimony?

19 A. Oh, no, not deposition. It was a legal statement.

20 Q. Okay. Legal statement. So did you provide a sworn
21 written statement at one point in this case?

22 A. Yes, I did.

23 Q. And did you review that statement before you testified
24 here today?

25 A. Yes, I did.

1 Q. Is there anything in that statement you wanted to
2 correct?

3 A. Yeah. I mean, there were two things at the beginning
4 of that particular statement.

5 One was that I worked for Federal Insurance
6 Company for those 28 years. That is partially true. That
7 was up until about 2016. I was a Federal Insurance Company
8 employee. When we were acquired by ACE and became Chubb
9 Limited, that Federal Insurance went away. So I can't tell
10 you who I was an employee of, but it wasn't Federal
11 Insurance. So for those couple of years it changed.

12 The other one is, there is mention in the, in the
13 legal statement that I was the controller for North
14 America. And at the time when I was giving that legal
15 statement, silly on my part, I thought North America meant
16 only the United States. Okay? So I clarify that with, I
17 was a controller for a centralized group that provided
18 services worldwide, but my budget responsibilities were
19 North America -- excuse me -- were the United States, not
20 Canada or Mexico.

21 Q. So when you said in your sworn written statement that
22 you were the controller for North America, that was a
23 mistake?

24 A. That was a mistake.

25 Q. Okay. And you meant just to refer to the U. S.?

PHILIP FOLZ DIRECT

1 A. Yes.

2 Q. Okay. Returning to your work at Chubb in this 2006
3 time period, to whom were you reporting?

4 A. June Drewry, who was the global chief information
5 officer.

6 Q. And during your nearly 30 years at Chubb, Mr. Folz,
7 approximately how many software license agreements and
8 renewals were you involved in?

9 A. Probably a couple hundred.

10 Q. Did there come a time in 2006 when you became involved
11 in negotiations with FICO for a license for Blaze?

12 A. Yes.

13 Q. And can you describe the circumstances that led to your
14 involvement?

15 A. So at Chubb we already had FICO. We were already using
16 FICO within one of our divisions at Chubb, our specialty
17 lines division. We had an interest in taking that rules
18 engine capability and extending it to other areas, both
19 within the United States and globally.

20 So my role was to work with FICO and our vendor
21 management and legal folks to try to come up with the best
22 deal possible to acquire what's called an enterprise
23 license that would extend the rights and usage of that
24 software globally.

25 Q. You talked about an enterprise license. In the context

1 of your work at Chubb, was the term "enterprise"
2 interchangeable with "global" or did those two things mean
3 something different?

4 A. That's a good question. So "enterprise," "global" and
5 "worldwide" all mean the same thing at Chubb. So if we
6 said, We want a worldwide deal, right, it means we want a
7 worldwide deal, global, enterprise, all the same thing.

8 Q. What was your understanding of why Ms. Drewry, your
9 boss at the time, wanted to explore turning the Blaze
10 license into an enterprise or global deal?

11 A. So one of June's strategies was to standardize certain
12 functionality across zones so that we could better leverage
13 capability -- we could better leverage human resources and
14 leverage costs.

15 Q. At the time Ms. Drewry asked you to get involved in the
16 negotiations with FICO, you understood that Chubb already
17 had a license with FICO, right?

18 A. Yes.

19 Q. And what was your understanding of the scope of that
20 already-existing license?

21 A. So the existing license was for one strategic business
22 unit. That strategic business unit was our specialty group
23 in the United States.

24 Q. What do you recall doing when you were first asked by
25 Ms. Drewry to get involved in this?

1 A. So the first thing I would do is contact our vendor
2 management group, let them know that we have an interest in
3 opening up a negotiation or at least a discussion with FICO
4 on the possibility of doing an enterprise deal.

5 Next, I would have called Mark Berthiaume, who
6 was the senior IT manager within the Chubb specialty unit,
7 the area that already had the license, and, you know, kind
8 of discuss the license agreement that we already had with
9 him.

10 And then, finally, we would reach out to FICO,
11 and I believe it was Larry Wachs that we spoke to, and open
12 up negotiations.

13 Q. Were you personally involved in those communications
14 with FICO?

15 A. Yes, I was.

16 Q. You mentioned Larry Wachs at FICO. Was there anyone
17 else at Chubb that was involved?

18 A. Yes. So Jim Black from vendor management was involved
19 with me.

20 Q. And what's your recollection about the general process
21 of those negotiations? Was it phone calls, e-mails,
22 letters? Tell us about that.

23 A. Mostly phone calls and a couple of e-mails, as I
24 recall.

25 Q. When you set out to determine whether the Blaze license

1 could be expanded to enterprise-wide, did you have a budget
2 or a high-end dollar amount in mind for what Chubb would be
3 willing to pay?

4 A. Yes, I did.

5 Q. And what was that?

6 A. It was approximately two million dollars was my upper,
7 upper end.

8 Q. And how did you come up with that number?

9 A. So I took a look at what we had spent so far for what
10 we had bought. And I also, to be quite honest with you, I
11 had -- that's what I kind of had left over in the budget to
12 spend. So if it was going to be five million dollars, it
13 was a nonstarter.

14 Q. And once you had that two million high end target in
15 mind, what, if any, plan did you have for how to allocate
16 those costs across the organization if you were able to
17 close the deal?

18 A. Mm-hmm. So prior to the, prior to negotiating the
19 deal, we did reach out to all of the areas within IT to
20 gauge interest in using this particular piece of software,
21 you know, within their applications. And as we did that,
22 it was with the understanding that if we were to come to a
23 deal, I would then allocate expenses to them in future
24 years for like the maintenance aspects of the license
25 agreement.

1 Q. You talked about these other IT areas. Did that
2 include Chubb Australia, Canada and Europe?

3 A. Yes. Yes, it did.

4 Q. Now, at this point in time in 2006, you had been at
5 Chubb for more than 15 years, correct?

6 A. Yes.

7 Q. As of that time period, what was the highest dollar
8 value of a software license you had been involved in
9 negotiating?

10 A. Personally? Four or five million dollars, yeah.

11 Q. What were the circumstances of that type of license
12 fee?

13 A. So it was a complete suite of IBM products that did
14 much more than the rules engine.

15 Q. So from the perspective of an IT controller at Chubb,
16 was a suite of IBM products comparable to the Blaze
17 software in terms of functionality?

18 A. No, no. Much broader.

19 Q. From the perspective of a controller who negotiated
20 hundreds of agreements for Chubb, what would your reaction
21 have been to a proposal that Chubb pay 50 million dollars
22 to access Blaze to use for a period of ten years in 17
23 applications?

24 A. I think that's ridiculous.

25 Q. Okay. I want to take a look at the back and forth

1 between Chubb and FICO over the license agreement. And if
2 we could pull up on the screen P112, which is already in
3 evidence.

4 A. Is this water?

5 Q. Yes. You can use the water.

6 Mr. Folz, do you recognize this e-mail exchange?

7 A. Yes, I do. Yes, I do.

8 Q. And this is from December 12th, 2006, right?

9 A. Yes, it is.

10 Q. Okay. And if you look at this first page, the second
11 e-mail down, there is a message from Mr. Wachs. Do you see
12 that?

13 A. Yes.

14 Q. And it says, "Jim, see our responses to the questions
15 raised by Phil. They are noted in blue text. Should you
16 need further clarification or wish to discuss these
17 further, please don't hesitate to call," right?

18 A. Yes.

19 Q. And the "Jim" is Mr. Black at Chubb?

20 A. Yes, it is.

21 Q. Do you have an understanding why Mr. Wachs is referring
22 in this e-mail to questions raised by Phil?

23 A. Yes.

24 Q. What's your understanding?

25 A. I asked these questions. So this was later in the

1 deal. So this was in December, early December. I asked
2 these questions of Jim to relay to Mr. Wachs.

3 Q. And did Mr. Black then relay FICO's responses to you at
4 some point?

5 A. Yes, he did.

6 Q. Okay. I want to focus on the second question that you
7 asked Mr. Black to pass along to FICO.

8 And that's about a third of the way down the
9 second page, Vanessa, if we could flip to the second page.

10 And if you look at number 2 in that list of
11 questions, we can blow that up. Thank you.

12 It says, "For options 1 and 2 are there any
13 restriction in using or redistributing the licenses across
14 SBUs or other IT areas. Said another way, do we get
15 licensing rights to 30 and 45 licenses respectively to
16 distribute as we see fit anywhere at Chubb?"

17 Do you see that?

18 A. Yes.

19 Q. When you used the word "Chubb" there, did you intend to
20 refer to Chubb & Son or the Chubb Group?

21 A. The Chubb Group.

22 Q. What does SBU mean?

23 A. Strategic business unit.

24 Q. And why did you have this question for FICO?

25 A. So, again, the context of the deal was to use it

1 globally. And what we wanted to do was we wanted to be
2 able to distribute the software globally without
3 restrictions on the number of seats. So if there was an
4 interest in more of our applications, wanting to use the
5 software, we wanted to be able to do that.

6 Q. Can you read FICO's response which is embedded
7 underneath the question?

8 A. Yes. "There are no usage or redistribution
9 restrictions within Chubb in any of the options within the
10 seat limitations of options 1 and 2."

11 Q. And what did you understand that to mean in terms of
12 the scope of what FICO was offering at that point in the
13 negotiations?

14 A. Okay. So within the 30 and 45 seat limitations for
15 those two options, I can distribute that software anywhere
16 I want.

17 Q. Okay. Let's take a look at D58, which should be in the
18 binder in front of you, Mr. Folz.

19 It is not in evidence yet, but I believe there is
20 no objection?

21 Is that correct?

22 MR. HINDERAKER: Yeah. That's correct.

23 MS. GODESKY: Okay. So defendants offer D58 in
24 evidence.

25 THE COURT: D58 is received.

PHILIP FOLZ - DIRECT

1 MS. GODESKY: Thank you.

2 BY MS. GODESKY:

3 Q. Mr. Folz, do you recognize the e-mail on this document?

4 A. Yes.

5 Q. And what's happening here?

6 A. So that's an e-mail that I drafted to our leadership
7 team. And I'm just, more or less, informing them what the
8 major components of the deal was and that it would be
9 discussed at our next senior management meeting for, you
10 know, approval.

11 Q. What's the date on this document?

12 A. My e-mail was 12/15/2006.

13 Q. And in the first sentence you wrote, "Today, Julia, Jim
14 Black and I had a conference call with the folks from Fair
15 Isaac and received their best and final pricing offer for
16 an enterprise deal." Do you see that?

17 A. Yes.

18 Q. To what enterprise were you referring when you said
19 "enterprise deal"?

20 A. The Chubb Group of Insurance Companies.

21 Q. Did your reference to an enterprise deal in this
22 message include Chubb Canada, Australia and Europe, or were
23 you excluding them?

24 A. I was including them.

25 Q. What, if any, conversations have you had with the folks

1 at Chubb Canada, Chubb Australia and Europe at this time
2 period regarding the potential for them to use Blaze?

3 A. Again, you know, as part of our -- during negotiations
4 we reached out to each one of them to gauge interest, and
5 we were receiving favorable responses.

6 Q. So let's look at number 3 in your e-mail, the second to
7 last paragraph.

8 You wrote, "They've also asked that we allow them
9 to issue a press release once we execute the deal. I told
10 them that we do not typically do this, but would inquire
11 with Corp Communications if we were going to do the deal.
12 Finally, they've asked that we speak at a future client
13 forum."

14 Do you see that?

15 A. Yes.

16 Q. To what were you referring with your reference to "Corp
17 Communications"?

18 A. So Chubb had an overall -- non-IT-related, but an
19 overall corporate communications department that did all of
20 the messaging, external messaging for Chubb. That's what I
21 was referring to.

22 Q. What, if any, understanding did you have at the time as
23 to why FICO wanted a press release and someone to speak at
24 this forum?

25 A. So within the insurance industry, Chubb is considered a

1 marquis client; and FICO landing an enterprise deal with a
2 company like Chubb is a big deal for them.

3 Q. As someone who worked in the Chubb Group of Insurance
4 Companies for three decades, how would you describe the
5 brand recognition of Federal Insurance Company?

6 A. No one outside of Chubb knows Federal.

7 Q. Was the decision to agree to a press release for FICO
8 in this time period typical or was it a special
9 accommodation?

10 A. It would have been a special accommodation.

11 Q. Okay. Let's turn to the license agreement, which is in
12 evidence as J1. And if we could turn to page 8, Vanessa.

13 Do you see on the screen, Mr. Folz, there is a
14 provision titled No Assignment?

15 A. Yes.

16 Q. Were you responsible for negotiating assignment
17 provisions at Chubb?

18 A. No.

19 MR. HINDERAKER: Your Honor? Could we have a
20 side-bar, and I will raise my objection?

21 THE COURT: Approach.

22
23 **(Side-bar discussion.)**

24 MR. HINDERAKER: Mr. Folz's e-mail communications
25 and involvement with the license agreement began in

1 December with respect to Amendment Number Two. He has no
2 foundation to discuss the license agreement as it was
3 negotiated in June of 2006.

4 And as Ms. Godesky's question raised was not
5 whether he had negotiations -- I'm sorry -- about 10.8 of
6 this license agreement, but does he have experience
7 negotiating assignment agreements in general, not specific
8 to this contract.

9 THE COURT: Where are you going?

10 MS. GODESKY: I just want to ask him, Did you
11 have responsibilities for negotiating assignment provisions
12 at Chubb? No. Who had that responsibility? Legal. I
13 just want them to know I'm not addressing this with him
14 because it's outside of his bounds.

15 MR. HINDERAKER: I agree it's outside of his
16 bonds, so we're on the same page. Thank you.

17
18 **(In open court with the Jury present.)**

19 THE COURT: Mr. Folz, you will have to turn your
20 microphone back on.

21 BY MS. GODESKY:

22 Q. So, Mr. Folz, we were looking at this assignment
23 provision on the screen, right?

24 A. Yes.

25 Q. Did you have responsibilities at Chubb for negotiating

1 assignment provisions?

2 A. No. Provisions like this are negotiated by our legal
3 department.

4 Q. Okay. So I want to look at the second amendment, which
5 starts at J19. And this is the amendment to the license
6 agreement that you were negotiating, right?

7 A. Yes, it is.

8 Q. And if we could look at the table on this first page,
9 what was the scope of this Blaze license as amended in
10 December 2006?

11 A. So enterprise-wide.

12 Q. And to what enterprise are you referring?

13 A. The Chubb Group of Insurance Companies.

14 Q. We saw some references in the e-mail that we were just
15 looking at to limitations on the number of seats that could
16 use Blaze. Do you remember that?

17 A. Yes.

18 Q. Did the final version of this amendment have any
19 limitations on seats or use?

20 A. There were no limitations on seats or use.

21 Q. And how long was this license meant to last?

22 A. It's a perpetual license, so it's forever.

23 Q. What was the pricing arrangement for this license?

24 A. So we paid -- the price was a million, three. We got a
25 \$350,000 discount for moneys we had paid for the previous

1 SBU-based license earlier in the year. And so it netted
2 out that we paid a one-time fee of \$950,000, plus the first
3 year's maintenance.

4 Q. Vanessa, could we pull up defendants' demonstrative 22,
5 please.

6 Mr. Folz, have you seen this before?

7 A. Yes, I have.

8 Q. And is it a summary of key terms in the various license
9 agreements?

10 A. Yes, it is.

11 Q. Can you walk the jury through how the Blaze license
12 agreements changed over time?

13 A. Yes. So it basically evolved over time. We started
14 out -- and this is typical in the way Chubb and other
15 companies do this. You start out, you're acquiring this
16 capability, you want to try it out.

17 So our first license agreement June 30th, 2006,
18 is for a single application within the overall portfolio.
19 So one application we could use it. On, and it was limited
20 to five seats. Okay?

21 Then we decided that we were going to expand the
22 usage to one SBU, strategic business unit. Chubb had
23 multiple strategic business units. So we were going to
24 expand it to one. It was the SBU in which the application,
25 the original application that we did the initial license

1 for resided. So now we were going to get the rights to use
2 it throughout the SBU. They had multiple applications that
3 they were interested in using it on. And for that we
4 negotiated a price of \$350,000 plus maintenance. And we
5 got the right to use it on up to ten seats, so we could
6 deploy it to ten developers for that price.

7 So then we did that in August. We now see that
8 this has a potential to be a strategic asset that we could
9 deploy and leverage globally. So we now decide that we're
10 going to pursue an enterprise-deal to where, instead of
11 limiting it to one SBU, we're going to deploy it everywhere
12 throughout the Chubb Group of Insurance Companies, which
13 includes our international locations.

14 And that was the deal that we did at the end of
15 the year in December, and that was the 1.3 million with the
16 credit and the maintenance. So it netted out to \$950,000
17 for that deal, plus first year's license fees.

18 Q. From the perspective of a controller at Chubb, what, if
19 any, significance was there to you in the fact that there
20 were no limitations on the number of seats in the agreement
21 that you negotiated?

22 A. Yeah, that's great for us because, you know that gives
23 us ultimate flexibility to deploy the software in
24 situations where we think it best can fit.

25 Q. So that had some value to Chubb?

PHILIP FOLZ DIRECT

1 A. Yes, it did.

2 Q. Okay. Now if we could, Vanessa, jump back to the
3 license agreement and look at page 9. This is J1.

4 So Vanessa blew up on the screen the signature
5 blocks on the June 2006 license agreement. Do you see
6 that?

7 A. Yes.

8 Q. And the original contract was signed by Mr. Mark
9 Berthiaume on behalf of Chubb, right?

10 A. Yes.

11 Q. What was his role in 2006?

12 A. So Mark was the senior IT leader that ran the Chubb
13 specialty lines strategic business unit. So he provided
14 the IT services back to that strategic business unit.

15 Q. Would Mr. Berthiaume have signed a global or
16 enterprise-wide license agreement in 2006?

17 A. No, he wouldn't.

18 Q. Why not?

19 A. He didn't have global responsibilities.

20 Q. Okay. Now I want to look at the amendment that you
21 negotiated at the end of the year, which is on page 20.
22 And we can see that this time it was signed by Ms. Drewry
23 on behalf of Chubb, correct?

24 A. Yes.

25 Q. Why didn't you sign it?

1 A. I couldn't sign it. June Drewry was the global CIO, so
2 she had responsibilities globally. I didn't have those
3 responsibilities globally. I could negotiate a global
4 deal. I couldn't commit us to a global deal.

5 Q. During this time period did anyone other than
6 Ms. Drewry have authority to sign enterprise-wide global
7 deals?

8 A. Within IT, no.

9 Q. During this time period to what extent were license
10 agreements for Federal signed under the name Chubb & Son, a
11 division of Federal?

12 A. I would venture to say almost all of them.

13 Q. Do you have an understanding of why that is?

14 A. That was provided by legal.

15 Q. Okay. Let's go to page 20 of the second amendment, if
16 we could.

17 And so we're still in the license amendment that
18 you negotiated, Mr. Folz. Can you read the first two
19 sentences of this portion of the document out loud?

20 A. "For purposes of this Amendment Two, the
21 enterprise-wide license shall mean that client and its
22 affiliates may use the Fair Isaac product for their
23 internal business purposes, with no limitation on the
24 number of seats or CPUs, subject to and in accordance with
25 all of the provisions of the agreement. 'Affiliates' shall

mean any other entity directly or indirectly controlled by client where control means the ownership of more than 50 percent of the aggregate of all voting interests (representing the right to vote for the election of directors or other managing authority) in an entity."

Q. Mr. Folz, was it your intent at the time you negotiated this agreement to ensure that Federal's affiliates at Chubb Canada, Australia and Europe could use Blaze, or were you limiting things to just the Chubb & Son division?

A. This was a global deal, so all of those other affiliates would have the right to use it.

Q. Chubb Canada, Chubb Australia, Chubb Europe?

A. Yes.

Q. Were you involved in any communications with representatives of FICO where you expressed that your intent was for the entirety of Chubb Group to have access to the software?

A. Yes. Throughout the entire negotiation, that intent was made abundantly clear through -- in multiple conversations with Larry, Larry Wachs. And, you know, quite frankly, if this was not going to be a global deal, I wouldn't have been involved in it.

Q. Did you believe that Mr. Wachs shared your understanding in 2006 that if the deal was signed, all of Chubb's global affiliates would be able to use Blaze?

PHILIP FOLZ DIRECT

1 A. Absolutely.

2 Q. Did anyone from FICO ever suggest to you during these
3 negotiations that only the Chubb & Son division of Federal
4 could use Blaze?

5 A. No.

6 Q. Would you have agreed to pay 1.3 million dollars for a
7 Blaze license that excluded Federal's affiliates in Canada,
8 Australia and Europe?

9 A. No. If this was not going to be an enterprise deal, we
10 were not going to continue with the negotiation.

11 Q. Now, Mr. Folz, do you have a general understanding that
12 FICO is taking the position in this case that the Blaze
13 license agreement limited access to Blaze to the Chubb &
14 Son division of Federal?

15 MR. HINDERAKER: Your Honor, approach again.

16 THE COURT: Pardon me?

17 MR. HINDERAKER: May we approach again.

18
19 **(Side-bar discussion.)**

20 MR. HINDERAKER: I believe you've already ruled
21 that we're not going to be litigating the litigation.

22 THE COURT: True.

23 Again, where are you going on this one?

24 MS. GODESKY: I just want to ask him if he has a
25 general understanding and what's his reaction to that. As

1 the person who negotiated the deal, I think that is highly
2 probative and relevant evidence, what's his reaction to
3 FICO taking the position that, you know, he negotiated a
4 deal on behalf of Chubb & Son.

5 MR. HINDERAKER: I would prefer that he be asked
6 a question that's factual, meaning to say, without
7 characterizing FICO's position, without denigrating FICO's
8 position, without litigating the litigation.

9 THE COURT: I think we have asked throughout the
10 trial if people understand what the respective parties'
11 positions are and their reaction to it. I believe FICO has
12 been asked that, and so I will let those -- respond to
13 that.

14 MS. GODESKY: I'll ask that.

15 THE COURT: Yeah.

16 MR. HINDERAKER: I have no quarrel with his
17 understanding of an issue.

18 THE COURT: Right.

19 MR. HINDERAKER: I have a quarrel with litigating
20 the litigation and denigrating the FICO position in the
21 litigation with respect to his understanding of our
22 position.

23 MS. GODESKY: I'm not denigrating. I'm not
24 characterizing it in any way in my question.

25 THE COURT: I understand.

1
2 (In open court with the Jury present.)

3 BY MS. GODESKY:

4 Q. You have to turn your mic back on.

5 A. I did.

6 Q. Okay. Do you have a general understanding, Mr. Folz,
7 that FICO has taken the position in this case that the
8 Blaze license is limited to the Chubb & Son division and
9 that the software could not be used by Chubb Australia,
10 Chubb Europe and Chubb Canada?

11 A. Yes.

12 Q. What's your reaction to that?

13 A. That's ridiculous. That's not what we negotiated and
14 agreed to.

15 Q. When you say "we," do you mean you and Mr. Wachs?

16 A. Chubb and FICO.

17 Q. In your decades of negotiating license agreements on
18 behalf of Chubb, did you ever consider licensing structures
19 where Chubb would pay more money if it started earning more
20 revenue?

21 A. No.

22 Q. Did that come up from time to time? Did vendors ever
23 suggest it?

24 A. So in an initial negotiation, yes, but not subsequent
25 to doing a deal and --

PHILIP FOLZ - DIRECT

1 Q. What -- I'm sorry.

2 A. I'm sorry. And we typically would not do revenue-based
3 deals.

4 Q. Why do you say that?

5 A. They're harder to administer. You fight over what's
6 revenue, what's not revenue. It just gets a little bit
7 messy.

8 Q. Okay. Mr. Folz, I want to look at defendants'
9 demonstrative 5, if we could. And this is a list of
10 applications that use Blaze at Chubb.

11 Did you ever use any of the computer applications
12 listed on this chart as part of your day-to-day work at
13 Chubb?

14 A. No.

15 Q. Okay. Thank you. We can take that down.

16 And then, Vanessa, if we could go to D328.

17 Which I think is also in your binder, Mr. Folz.

18 This is not in evidence, so I think we should
19 wait to publish it, if there is an objection.

20 MR. HINDERAKER: There is no objection to this or
21 the other two, Your Honor, unless they are all one.

22 MS. GODESKY: Thank you.

23 THE COURT: I'm sorry. That exhibit is received.

24 MR. GODESKY: Thank you.
25

PHILIP FOLZ - DIRECT
1 BY MS. GODESKY:

2 Q. So if we could put that back up on the screen.

3 What are we looking at here, Mr. Folz in
4 Exhibit D328?

5 A. So our vendor management group kept a database of all
6 the contracts that we enter into, and this is a record, a
7 printout of the Blaze Advisor contract.

8 Q. And would you from time to time reference these vendor
9 management printouts in your work at Chubb?

10 A. Yes.

11 Q. Okay. Let's look at the second page.

12 Do you see in the upper right-hand corner where
13 it says Chubb Department Contact, Phil Folz?

14 A. Yes.

15 Q. And what was the significance of that?

16 A. Because I led the negotiation, I was the primary
17 contact within IT during the negotiation, my name is there.

18 Q. And then Mr. Wachs's name is listed underneath yours,
19 right?

20 A. Yes.

21 Q. And then I want to look at the box that says "Contract
22 Notes." Do you see that towards the bottom?

23 A. Yes.

24 Q. It says, "Amendment Two upgrades CSI divisional license
25 to a worldwide enterprise license." Do you see that?

PHILIP FOLZ - DIRECT

1 A. Yes, I do.

2 Q. And what would be the significance of that entry from
3 the perspective of an IT controller?

4 A. So for me that means that now we have extended usage in
5 this case from going from a division to worldwide, use of a
6 particular piece of software. And from an IT controller
7 standpoint, that now, the cost of those, the cost of that
8 software going forward, like the maintenance, would be in
9 my budget, would now be retained in my budget, and I would
10 allocate out expenses to other budgets based upon who was
11 using the software.

12 Q. From the perspective of a Chubb controller, would this
13 reference to a worldwide enterprise license include
14 entities like Chubb Canada, Chubb Europe and Chubb
15 Australia?

16 A. Yes, it would.

17 Q. Now I want to switch topics and return to that concept
18 of allocation you've mentioned a few times. And let's look
19 at D67, which is now in evidence.

20 Mr. Folz, do you recognize this e-mail?

21 A. Yes, I do.

22 Q. And this is an e-mail that you sent in March of 2009,
23 correct?

24 A. Yes.

25 Q. And you sent it to the Knight Direct Reports. What

PHILIP FOLZ DIRECT

1 does that mean?

2 A. So June Drewry was the global CIO at the time of the
3 2006. Jim Knight succeeded her as global CIO after she
4 retired.

5 Q. Can you read the message in your e-mail out loud?

6 A. Sure. "At our November offsite we agreed that we would
7 review and as necessary revise the current controllable
8 expense allocations for the Blaze business rules engine.
9 There is an agenda item on tomorrow's SLT meeting" -- SLT
10 is senior leadership team -- " meeting agenda, and I've
11 pulled together the attached aid our discussions tomorrow.
12 Thank you, Phil."

13 Q. So you created the document that's attached?

14 A. Yes, I did.

15 Q. And let's look at page 3, the attachment. And there we
16 see a chart titled, Fair Isaac - Blaze Enterprise Asset
17 Discussion. Do you see that?

18 A. Yes.

19 Q. What does this chart show in terms of to what parts of
20 the Chubb Group costs for the Blaze license were allocated?

21 A. It shows that we are allocating across all areas of
22 Chubb. And I can particularly highlight OUS, the bottom
23 one. That's all of our overseas location.

24 Q. So what does OUS stand for?

25 A. Outside of U. S.

1 Q. And from the perspective of a Chubb controller, would
2 that include Chubb Canada, Chubb Australia and Chubb
3 Europe?

4 A. Yes, it would.

5 Q. Did you end up charging Chubb Australia, Chubb Canada
6 and Chubb Europe for use of Blaze consistent with the
7 allocations in this chart?

8 A. Yes, we did.

9 Q. And to your knowledge, did they then pay consistent
10 with the allocations?

11 A. Yes, they did.

12 Q. Mr. Folz, in what circumstances, if any, would you have
13 charged Chubb Canada, Chubb Australia and Chubb Europe for
14 a software license that they weren't permitted to use?

15 A. I could try it, but they would come back at me. I
16 couldn't do it, and that's the short answer.

17 MS. GODESKY: Thank you, Mr. Folz. I have no
18 further questions.

19 THE COURT: Thank you, Ms. Godesky.

20 Mr. Hinderaker.

21 MR. HINDERAKER: Thank you.

22 **CROSS EXAMINATION**

23 BY MR. HINDERAKER:

24 Q. Get myself reset. Okay. Are you ready? I think I am
25 finally.

1 A. I'm fine.

2 Q. Okay. Good. We haven't met. My name is Al
3 Hinderaker. I'm one of the lawyers for FICO in the
4 lawsuit.

5 A. Nice to meet you.

6 Q. Nice meeting you. I have some follow-up questions. I
7 enjoyed your answers.

8 Now, let me start in that 2016 time frame in the
9 context of the, in the context of the acquisition of Chubb
10 Corporation by ACE Limited. And you mentioned that when
11 you were acquired by ACE, your words were, "Federal went
12 away."

13 Now, are you saying to us that as a legal entity
14 and on the legal organizational chart of now Chubb Limited
15 that the legal entity Federal Insurance Company ceased to
16 exist?

17 A. I'll clarify. I'm not offering a legal interpretation.

18 Q. Uh-huh.

19 A. I just got a paycheck from a different company.

20 Q. So outside of your control; but as a consequence of the
21 acquisition, where you were once paid by Federal, now
22 you're paid by ACE American?

23 A. Somebody else, yeah.

24 Q. Somebody else. All right. And, I take it, we've

25 heard -- well, from your experience then as well, it was

1 true that about January 1st of 2017, whoever was an
2 employee of Federal became an employee of ACE American?

3 A. Yes.

4 Q. Yes. And then within the, within the Federal division
5 of Chubb & Son, everyone who identified as a member of the
6 Chubb & Son division also became employed by ACE American,
7 this other company?

8 A. I don't think I can answer that.

9 Q. All right.

10 A. I think that's more a legal interpretation between the
11 two entities, because we were -- we identified ourselves as
12 Chubb.

13 Q. Understood.

14 A. That was our brand. That's, you know, how we
15 represented ourself to the public. The Federal/ACE America
16 thing, that's just a legal entity that I guess was used to
17 pay us. So I don't know. I don't know how else to answer
18 that question.

19 Q. That's fair. We'll just leave it at that point in time
20 you were paid by somebody else?

21 A. Somebody else.

22 Q. All right.

23 A. Somebody who acquired us.

24 Q. As I understood, understood your testimony, as Chubb
25 understood the term "global" -- I'm sorry. As Chubb

1 understood the term "enterprise," as Chubb understood the
2 term "enterprise," "enterprise" means "global," correct?

3 A. Correct.

4 Q. Now, I know that you were -- let's look at that J1
5 document.

6 And with respect to the original license
7 agreement, that was June 30, 2006. As I heard your
8 testimony, you were not a part of those negotiations.

9 A. That is correct.

10 Q. Indeed, as I heard your testimony, you would not have
11 been a part of those negotiations because the original
12 license was one application for a specialty lines' use?

13 A. That's correct.

14 Q. All right. And then if we go to, if we go to Amendment
15 Two -- I'm sorry. If we go to Amendment One in the
16 document, which is -- FICO signed August 1, Robert Cox
17 signed July 21, 2006. You were not a part of that
18 negotiation, either?

19 A. That's correct.

20 Q. Okay. And Robert Cox signs as an executive vice
21 president of Chubb & Son. Do you have any reason to
22 believe he was not an executive vice president of Chubb &
23 Son?

24 A. Well, Bob Cox ran the Chubb specialty division, so he
25 was the senior business lead for Chubb specialty.

1 Q. Okay. And then, and then in terms of the Amendment
2 Two, as you described, that was signed by June Drewry. And
3 she signs that as the CIO of Chubb & Son, a division of
4 Federal Insurance Company.

5 So I'm not -- you know, I hear and understand, I
6 think, that inside Chubb, "enterprise" means "global." If
7 you were going to confirm whether that understanding was
8 shared by the parties, in your judgment, it would be fair
9 to look at what the license agreement actually says?

10 A. Yes, and our discussions. Sure.

11 Q. Sure. And I'm not dismissing your discussions by one
12 bit, but would you agree with me that if those discussions
13 turn into -- the way to find out if those discussions turn
14 into what the agreement really is between the parties,
15 you're going to look to the license agreement itself?

16 A. Yes, but also -- I mean, we do have some documentation
17 that says it.

18 Q. I saw the e-mails.

19 A. Yeah.

20 Q. Do you think your e-mails override the written words of
21 the license agreement?

22 A. There is an understanding between the parties. As an
23 example, while I was preparing to testify today, I did see
24 an e-mail from Larry to his management saying, yeah, we
25 sold them a global deal.

1 Q. The evidence may be that there is a misunderstanding.
2 But my question to you is, If you want to find out if there
3 is a misunderstanding or if both sides have the same
4 understanding, the place to find that answer is in the
5 written agreement that the parties signed, being the
6 license agreement. Do you disagree with that?

7 A. I don't disagree. That's fair.

8 Q. And then the Amendment One -- we know that the original
9 license agreement was limited to the specialty lines. And
10 then we also know, do we not, that through the various
11 amendments, Amendment One divisional lines, the full
12 division of the specialty, and we do agree, do we not, that
13 as a consequence of Amendment Two, the rights to use Blaze
14 Advisor extended now to the commercial lines of insurance
15 that were sold.

16 A. It extended to all lines. Amendment Two extended to
17 all lines around the world.

18 Q. And the allocation document that you looked at -- I'm
19 not sure I have it.

20 Do you recall -- the allocation document you
21 looked at, where you had that meeting to think about
22 allocations, I noticed that CPI was one of the lines of
23 business for which an allocation was made. Do you recall
24 that?

25 A. Can I just refer to my document?

1 Q. Absolutely. I'm trying to find the same thing. There
2 we go. It's what -- your Exhibit D0067.

3 A. Yes. I see that.

4 Q. You see that. So 7 percent of the license fee. Do I
5 read that correctly?

6 A. 13 percent. 13 percent of the maintenance went to CPI.

7 Q. And that stands for?

8 A. Chubb personal insurance.

9 Q. So not only did the permission to use Blaze Advisor
10 extend to the commercial lines, it extended to the personal
11 lines as well?

12 A. Yes. The entire, the entire enterprise.

13 Q. Well, like I say, we'll look at the license agreement
14 with respect to the meaning of things.

15 Now, did -- in your role in negotiations, did you
16 work at all with the legal department in the drafting of
17 the terms of the license agreement?

18 A. Not the legal terms.

19 Q. Okay. And I would like to, if I might, go to your
20 Exhibit D0328.

21 And this is, this is one of the documents that
22 comes from your vendor management system at Chubb?

23 A. Yes.

24 Q. So for the, just to read this together a bit, for the
25 software license and maintenance agreement, the original

1 agreement, the Chubb entity in which this is filed is Chubb
2 & Son, a division of Federal, right?

3 A. That's what it says.

4 Q. And then the -- and as I said already, the Chubb vendor
5 management contact is Jim Black?

6 A. Yes.

7 Q. And then in terms of the Chubb department contact, it
8 references Dolores Sutton, agreed?

9 A. Agree.

10 Q. Then in your vendor management system, we will go two
11 documents forward. You have Amendment One that gives CSI a
12 divisional license, and that, of course, we know is Chubb
13 specialty. Again, the Chubb entity in which this is filed
14 is Chubb & Son, a division of Federal. Agreed?

15 A. Agree.

16 Q. And as before, the vendor management contact is Jim
17 Black?

18 A. Yes.

19 Q. Agreed? And now the Chubb contact is Dolores Sutton.
20 Agree?

21 A. I agree.

22 Q. And then if we go to the document that is Amendment
23 Two, again, Chubb entity is the division of Federal, Chubb
24 & Son the division of Federal?

25 A. Yes.

1 Q. And again Jim Black is the contact person?

2 A. Yes.

3 Q. And now you, with respect to Amendment Two, are the
4 Chubb department contact?

5 A. Yes.

6 Q. Okay. So that's the progression through.

7 And I noticed, you know, from your direct
8 examination now, as Chubb stored the information in its
9 system, it describes it as worldwide enterprise license.
10 But as before, you and I agree that if we're going to
11 confirm the accuracy of that, we would go and look at the
12 license agreement itself. Agree?

13 A. Agreed.

14 Q. Then let me go to D0058. And do you have that? I
15 believe this is in evidence.

16 Do you have that in front of you now, sir?

17 A. Yes, I do.

18 Q. And this is a document that's dated December 21, 2006,
19 and the title of it is Fair Isaac - Enterprise License.
20 And Mr. Berthiaume -- and we saw him as a signatory to the
21 original agreement, right?

22 A. Yes.

23 Q. And you are -- Dolores Sutton is one of the people on
24 the e-mail as well. And Mr. Berthiaume is saying to the
25 management team in December 21, we -- with respect to the

1 FICO Blaze Advisor license, "We got a good deal as a first
2 in."

3 Do I read that right?

4 A. Yes.

5 Q. And -- yes. And all of the pricing in terms of this
6 license agreement was pricing that was negotiated in the
7 time frame of 2006?

8 A. Can you clarify "this license agreement"?

9 Q. The license agreement that is this J1 in front of you
10 between Chubb & Son and FICO. And that license agreement
11 and the terms, but particularly the price, were all
12 negotiated in 2006?

13 A. Yes.

14 Q. Okay. Let me just look at my notes a minute more. And
15 if we could go back to the J1, please.

16 And let's just go to Amendment Two that you were
17 a part of. Do you have that?

18 A. Yes.

19 Q. All right. And I just want to see if you agree with me
20 that Amendment Two says that it's effective on a certain
21 date, December 28, and it amends the software license and
22 services agreement entered into on June 30th, and by and
23 between Fair Isaac and Chubb & Son, a division of Federal
24 Insurance Company, define term client. That's what it
25 says?

1 A. That's what it says.

2 Q. And so from, from your frame of reference, if someone
3 was to ask, what's the -- if someone was to ask, Is the
4 width and breadth, the full scope of the enterprise, the
5 scope of the enterprise that is the client under the
6 license agreement being Chubb & Son, a division, is that a
7 question that you would go seek legal advice on?

8 A. Yes.

9 Q. If I could direct your attention to P1180. Do you have
10 that before you?

11 A. It was here, but it went off, so --

12 Q. Okay.

13 A. It's back.

14 Q. And this is an e-mail from a Michael G. Meyer,
15 November 22, 2011, to you, right?

16 A. Yes.

17 Q. Among others, of course.

18 And the e-mail says, "Phil, FICO would like to
19 nominate Chubb for a Celent model carrier award for the
20 work we did with them on the Premium Booking modernization
21 program using their Blaze Advisor product and professional
22 services."

23 Did I read that right?

24 A. Yes.

25 Q. And Celent is a -- do you know the organization Celent?

PHILIP FOLZ - CROSS

1 A. Yes.

2 Q. And Celent is what?

3 A. It's more or less like a research type organization.

4 Q. Analyze -- gives analytical reports, market reports,
5 company product reports --

6 A. Yes.

7 Q. -- in this technology space and insurance. Agreed?

8 A. Yes.

9 Q. And so FICO would like to nominate Chubb for this
10 Celent model carrier award. Did you have any role or -- in
11 the Premium Booking modernization program that's being
12 referenced in the e-mail?

13 A. No.

14 Q. Then I would like to ask you to go to Exhibit 1073,
15 please. And let me know when you have it.

16 A. It's here.

17 Q. Okay. Great. And this is from a Robert Iskols? Did
18 I --

19 A. Iskols, yes.

20 Q. To yourself and a bunch of others. And the subject is,
21 Vendor Day - Need Input Please.

22 A. Okay.

23 Q. And in the second paragraph it says, "In terms of the
24 vendors (and this is where I need your input), we will
25 adjust last year's invitee list accordingly."

1 Then if we go a little farther into that same
2 paragraph, "Last year's invitees were Mckinsey, CAI, and
3 then Computer Associates, BCT Partners (who did not attend)
4 and Fair Isaac," among others.

5 Did I read that right?

6 A. Yes, that's what it says.

7 Q. So in 2010 Fair Isaac was considered a strategic
8 partner at Chubb, as well as 2011?

9 A. Yes.

10 Q. Thank you. And then if I -- and I am going to ask you
11 to, go to P0171A, please. And do you have that?

12 A. Yes.

13 Q. Okay. You are ahead of me. 0171. All right.

14 So 0171A is this e-mail from yourself to Ramesh
15 Pandey dated July 10, 2015, right?

16 A. Yes.

17 Q. And the e-mail references -- well, the subject line,
18 the attachment is, Chubb IT Overview for ACE. Do you see
19 that?

20 A. Yes.

21 Q. And so this time frame, even as early as July 2015, the
22 subject matter of this e-mail -- and we'll look at the
23 attachment briefly -- is the integration addressing the
24 integration plan of the technologies of the Chubb
25 Corporation and the ACE Limited companies?

1 A. Yes. Just starting.

2 Q. Just starting. But we know that the acquisition closed
3 in January of 2016 on a certain date.

4 A. Yes.

5 Q. And so we're about six months ahead of it at this point
6 starting that integration planning. Agreed?

7 A. Yes. So this was -- the deal was actually announced
8 July 1st, I believe it was, of 2015. So this is like ten
9 days after the deal was announced.

10 Q. Yeah.

11 A. So we're just kind of getting to know each other.

12 Q. Got it. And my point only is that you did start to get
13 to know each other?

14 A. Yes.

15 Q. And then the -- and then the attachment -- or the
16 attachment that goes with this is in your book as 171. Do
17 you see that? A big, big tech slides. I'm not going to
18 ask you about all this.

19 A. Okay.

20 Q. What is there? 80 slides? 90 slides? 100 slides.

21 I'm not going to ask you about all that. I just want you
22 to confirm that this Chubb information technology deck of
23 slides dated July 14 to 16, 2015, is some of the
24 documentation of the work that had begun at this July 2015
25 time frame for the integration of technologies in the two

1 companies?

2 A. I haven't had a chance to take a look at this, but I'm
3 somewhat familiar with this. This is like a lot of
4 introductory information that we were giving the acquiring
5 firm, ACE.

6 Q. Yep. Now it looks like that to me, too. I agree.

7 So, Mr. Folz, I enjoyed talking with you. Thank
8 you for your time.

9 A. Oh, thank you.

10 THE COURT: Thank you, Mr. Hinderaker.

11 Ms. Godesky, any further questions?

12 MS. GODESKY: I have no further questions. Thank
13 you, Mr. Folz.

14 THE COURT: Thank you, Mr. Folz.

15 THE WITNESS: Thank you.

16 **(Witness excused.)**

17 THE COURT: Ms. Godesky?

18 MS. GODESKY: Your Honor, may I approach?

19 THE COURT: You may.

20
21 **(Side-bar discussion.)**

22 MS. GODESKY: So we have no additional witnesses,
23 and we'll rest. But my only concern is we haven't done
24 that thing where we were going to read into the record all
25 of those exhibits that everyone agrees are in, but were

1 referenced during depositions. So if everyone is in
2 agreement we will do that at a break or something, I'm fine
3 with that, but I just wanted to make sure they all get in.

4 THE COURT: That's fine. We don't need to do
5 that in the presence of the jury.

6 MR. HINDERAKER: No.

7 MS. GODESKY: Certainly not in my mind, but I
8 didn't want to rest if they're not all in agreement.

9 THE COURT: I think we're all in agreement. You
10 have been doing it every day?

11 THE CLERK: Yes. I have communicated with
12 representatives with the parties. So we will just need to
13 confirm today's exhibits and then everything should be
14 fine.

15 THE COURT: And we will read it into the record.

16 THE CLERK: Yeah.

17 THE COURT: Okay. Very well.

18 MS. GODESKY: Okay. Thank you.

19

20 **(In open court with the Jury present.)**

21 MS. GODESKY: Thank you, Your Honor. Defendants
22 rest.

23 THE COURT: Thank you, Ms. Godesky.

24 Mr. Hinderaker?

25 MR. HINDERAKER: Not me, Your Honor.

NEIL ZOLTOWSKI - DIRECT

1 THE COURT: Ms. Kliebenstein.

2 MS. KLIEBENSTEIN: Yes, Your Honor. We call one
3 witness. Mr. Neil Zoltowski.

4 THE COURT: Very well. Thank you.

5 Mr. Zoltowski, come on up. I'm going to swear
6 you in again.

7 **(Witness sworn.)**

8 THE WITNESS: I do.

9 THE COURT: Go ahead and be seated. Your
10 microphone will have to be turned back on.

11 THE WITNESS: Okay.

12 THE COURT: Make sure you speak into it.

13 **(NEIL ZOLTOWSKI)**

14 **DIRECT EXAMINATION**

15 BY MS. KLIEBENSTEIN:

16 Q. Good morning, Mr. Zoltowski.

17 A. Good morning.

18 Q. I laid a folder on your table right there of some
19 documents that we'll go through.

20 A. Okay.

21 Q. You're back. I would like to ask you some questions in
22 response to some of the opinions from Mr. Bakewell, who we
23 met last week.

24 The first area that I would like to start with is
25 the company-wide revenues, the year after year, the line

1 charts, the bar charts that we saw. Do you agree with
2 Mr. Bakewell's position that Blaze Advisor couldn't
3 possibly affect revenue because the company-wide revenues
4 roughly stayed the same from 2006 to 2015 and then again
5 after the acquisition from 2016 to 2020?

6 A. No, I don't agree with him whatsoever. I think that
7 analysis or it's more of an observation, I guess, not an
8 analysis, and the conclusion from that observation is
9 flawed.

10 You can't look at a company with 30 billion
11 dollars of revenue on average per year and make any sort of
12 determination with 100 percent accuracy, which is what it
13 seems like he did, about Blaze Advisor's impact on their
14 revenue. I mean, you couldn't do that for any asset that
15 the company has at all.

16 It's like he's saying that if revenue was flat
17 from one year to the next that all of the factors that they
18 put up on the board, that none of them really did anything
19 to impact that revenue. It's really they have zero value.
20 Again, an example might be in 2007 if Federal had or Chubb
21 had hired a thousand new employees and revenue stayed flat
22 from 2007 to 2008 that those 1,000 employees did nothing
23 whatsoever. They have zero value to the company.

24 It just doesn't make any sense. It's illogical.
25 It just doesn't follow common sense.

1 Q. And while you were preparing to come back today, did
2 you look back over Interrogatory Numbers 16 and 17, which
3 we've looked at previously?

4 A. I did.

5 Q. And did you notice any trends in those interrogatories?

6 A. Yes. If you look at those interrogatories, the policy
7 counts were increasing, generally speaking, for the
8 applications year over year.

9 Q. And, Mr. Zoltowski, did you read Mr. Bakewell's
10 discussion about valuation of Blaze Advisor?

11 A. I did.

12 Q. Do you agree with his conclusion that Blaze Advisor
13 added no value to the defendants?

14 A. I wholeheartedly disagree. It's pretty clear that
15 there are economic benefits from the use of Blaze Advisor
16 by the defendants just in the insurance industry, generally
17 speaking. Flexibility, there is scaleability, there is
18 consistency with the underwriting process in total. There
19 is all sorts of benefits that are provided by the Blaze
20 Advisor software.

21 And you can see that with the fact that there was
22 the RFI that Chubb & Son put out in 2006 when they want to
23 enter the mid market, the middle market. They obviously
24 were looking for a solution that would help them do that.
25 They also, after they signed the license agreement for the

1 software, they expanded that use of the software over time.
2 And even after the acquisition and the termination of the
3 contract, they were still using the software.

4 So, I mean, it took more than I think four years
5 before they finally removed it from their systems, which,
6 if it had zero value as a profit maximizing enterprise, I
7 don't see why they would keep it. I don't know any of my
8 clients that would continue to use anything that provided
9 zero value to them.

10 Q. And your, your testimony that you spoke about earlier
11 on subsidiaries and pooling arrangements, does that have
12 any bearing on valuation?

13 A. I think it's just another example of the extended and
14 expanded use of the software, which just goes to value and
15 the fact that there was, obviously, there was value that
16 was, that was seen by individuals within that company, and
17 obviously they expanded that use to different subsidiaries
18 and other parts of the company.

19 Q. And what about FICO's revenues? We also heard
20 Mr. Bakewell talk about how FICO -- FICO's revenues would
21 impact valuation. What is your thought on that topic?

22 A. That really has zero bearing on this equation. It's
23 really about the defendants' use and the extent of use.

24 Interrogatory Number 17 really provides a roadmap
25 of the gross written premiums related to the applications

1 and the applications that used Blaze Advisor to price,
2 book, bind, analyze, quote insurance policies, as well as
3 use it to comply with regulatory requirements as well.

4 So there is a lot of ways that Blaze Advisor was
5 related to revenue-generating events within the defendants.

6 Q. And this is, this is a similar question, but I just
7 want to clarify what you just said. We heard about
8 economic connections on Friday, and it was suggested that
9 you didn't make any economic connections between the
10 revenues in your report and your testimony.

11 Do you agree with that statement?

12 A. No, I do not agree.

13 Q. Why not?

14 A. I laid that out in my report, just about the benefits,
15 and I've talked about those benefits from an economic
16 perspective. There is a connection; and as I said with the
17 Interrogatory Number 17, it's a roadmap. It shows that
18 there is use of the technology, and it's connected to
19 revenue or gross written premiums in this case.

20 Q. Let's move into the expense analysis that we saw on
21 Friday. I just wanted to clarify some things around the
22 expense analysis as well.

23 Do you understand Mr. Bakewell to have presented
24 any expenses relating to Chubb Canada in his disgorgement
25 analysis?

NEIL ZOLTOWSKI - DIRECT

1 A. No, he did not.

2 Q. And what about deductions or expenses relating to the
3 Legacy ACE companies?

4 A. No, he did not do that, either.

5 Q. And based on your calculations from Interrogatory
6 Number 17, how much revenue identified in your earlier
7 testimony came from Legacy ACE writing companies?

8 A. It's properly 3.5 billion.

9 Q. After reading Mr. Bakewell's testimony, what do you
10 understand to be Mr. Bakewell's opinion regarding cost
11 deductions in this case?

12 A. He has a schedule that he put together. It might be
13 easier just to go through his analysis from his report.

14 Q. Sure.

15 Mr. Mayleben, could you pull up slide 1 of the
16 demonstratives for today?

17 Here you go, Mr. Zoltowski. Same question: What
18 are we looking at here?

19 A. This is from Mr. Bakewell's analysis. And so it lays
20 out his analysis as it relates to the costs associated with
21 the gross written premiums at issue in this case for the
22 years 2016, 2017 and 2018. This was, I believe, part of
23 his report that he submitted back in 2019.

24 Q. And can you get a little closer to the microphone --

25 A. Sure. Sorry.

1 Q. -- or move it down. That's okay. I know you have to
2 look at the screen, too.

3 A. Sure.

4 Q. And walk us through -- take us through 2016. How do we
5 get, how do we do the math to get from the top to the
6 bottom?

7 A. Sure. So this is for the -- I should probably be clear
8 here. It's for the commercial and specialty insurance
9 lines, and it's for both of them combined.

10 And in 2016, if you look at the first, the first
11 row below the title Commercial and Specialty Insurance,
12 it's the gross written premium for 2016 of about 6.5
13 billion. And you'll note that that's about -- I think it's
14 about 2 billion dollars higher than the number in my
15 report -- or I'm sorry -- in my schedules that I provided
16 during my testimony, because these numbers are from a prior
17 supplement of the Interrogatory Response Number 17.

18 And if you take that 6.5, just to do the math, to
19 get to net written premium, he reduces the gross written
20 premium by 9 percent. So you can see the 91 percent below
21 the net written premium is just really the -- 100 minus 91
22 gets you your 9 percent production. And that's the
23 adjustment for any reinsurance that, that the commercial
24 and specialty insurance lines obtains.

25 And then there is one more step, again, which

1 Mr. Bakewell talked about, which is the accounting
2 adjustment. And that just relates to the type that, the
3 methodology of accounting, either cash or accrual
4 accounting. And so if you look from -- it's about 5.9
5 billion for net written premiums, and you see it actually
6 goes up into net earned premiums to 6.2 billion. That's
7 about a 4 percent increase. And, again, that's just an
8 adjustment for when revenue is actually recognized by the
9 company based on the accounting rules.

10 Q. Why don't you finish that column out, and then we'll do
11 a recap.

12 A. Sure. This is where we get into the expenses. So the
13 next line is the losses and LAE that's incurred. It's
14 about 3.3 billion. You can see below that that's the loss
15 ratio that Mr. Bakewell used of 53 percent.

16 And then the expense ratio, 27 percent, down
17 below the line, is made up of the commissions, the general
18 administrative expenses and the dividends incurred, which
19 total to the total expenses. And that expense ratio is
20 27 percent.

21 When you combine that 27 percent with the 53
22 percent loss ratio, that's where you get your combined loss
23 ratio of 80 percent. And as Mr. Bakewell stated, if you
24 take the inverse of that, that's your profit margin. So
25 100 minus 80 is 20 percent, and that's the number that is

1 right above the combined loss ratio. And that's what he
2 used to get his underwriting profit on the bottom line with
3 the big bold line below it of 1.3 billion.

4 Q. And so let me see if I can summarize what, what you
5 said in non- finance terms.

6 A. Sure.

7 Q. You would take the top number, that 2016 6.5, and
8 multiply -- reduce it by 9 percent. That's step one; is
9 that right?

10 A. Correct.

11 Q. And then you would actually increase it for that year
12 by 4 percent due to the --

13 A. Correct.

14 Q. -- timing of when cash is received, right?

15 A. Exactly. It's just a timing issue and an
16 accounting-related issue.

17 Q. And then you take that number and reduce it by the
18 losses and the expenses, correct?

19 A. Correct. The shortcut would be you could take that net
20 earned premium and then take 20 percent of that to get your
21 profit.

22 Q. That's another shortcut. And so -- period. That's,
23 that's the math that I see that you agree with, correct?

24 A. Correct. And it would be the same for 2017 and 2018.

25 Again, I think it's about 5 or 5.5 to 6 billion of

1 additional gross written premiums in Mr. Bakewell's
2 schedules compared to mine.

3 Q. And just to close out this, this spreadsheet, this
4 comes from Mr. Bakewell's report, correct?

5 A. Yes. That's my understanding.

6 Q. And the source -- what is the source of the data in
7 this schedule?

8 A. You can see it down below on the bottom left where it
9 says, source, it's FED 017882 underscore 0001.

10 Q. And so that's a spreadsheet that the defendants
11 produced in this case, correct?

12 A. Yes. That's my understanding.

13 Q. And we talked about this briefly before. What lines of
14 business were reflected in that spreadsheet?

15 A. My understanding is it was the two that are reflected
16 here in this schedule, which are the commercial and
17 specialty insurance lines.

18 Q. Why those two?

19 A. Because that's the lines that were using the
20 applications that used Blaze Advisor.

21 Q. And is line of business -- I think the answer is going
22 to be obvious, but is line of business, cost and expense
23 data, the same as company-wide loss and expense data?

24 A. No. It would be obviously different. It's going to be
25 a subset of the overall company. The business lines would

1 flow up together to consolidate, depending again on the
2 structure of the company. But this would just be one or
3 two of the lines compared to other lines which the company
4 has. So this would be a much, much smaller set of data.

5 Q. And did you see the formula that Mr. Bakewell wrote up
6 on the white board?

7 A. Yes.

8 Q. Did you see any errors in that formula, based on his
9 own schedule 8.1?

10 A. I think he tried to shortcut some of the numbers and
11 oversimplified them, but he had -- I believe he had a loss
12 ratio of 85 percent. And if you look at the bottom of this
13 schedule down in the box underneath the three-year average
14 column, it's 83 percent here. And you can see that it's,
15 for the three years of 2016, 2017 and 2018, it's 80
16 percent, 87 percent and 83 percent respectively.

17 Q. Did defendants ever update this slide 8.1, this
18 schedule 8.1?

19 A. Not to my knowledge.

20 Q. And do you know if the defendants ever ran any 2019
21 expense and loss data?

22 A. I do believe that was provided, yes.

23 Q. And was that company-wide or line of business?

24 A. It was similar to the information that Mr. Bakewell
25 used here for his source to create this schedule. So it

1 was the same commercial and specialty insurance line data.
2 Q. I would like to move to the next slide to finish this
3 off.

4 Could you explain to me what are we looking at in
5 this slide?

6 A. So this is the Interrogatory 17 revenue or the gross
7 written premiums based upon the data from Interrogatory 17
8 showing the applications that used Blaze Advisor over this
9 period, and it's broken up by year from 2016 through 2020.

10 And what this does is it takes that revenue and
11 it applies Mr. Bakewell's methodology, based upon the
12 percentages of his 2016 through 2018 schedule that we just
13 looked at.

14 Q. So the, in 2016, the 4.6 billion, that was the number
15 from your report, correct?

16 A. Yes. Like I said, it's almost 2 billion dollars less
17 than what Mr. Bakewell had in his schedule.

18 Q. And that's because of the correction of some
19 duplication issues in earlier versions of the interrogatory
20 responses, correct?

21 A. Correct. That's my understanding.

22 Q. And so you took that 4.6 and reduced it by 9 percent,
23 correct?

24 A. Correct.

25 Q. And that's from what we saw in the previous slide from

1 2016. And then you increased it by 4 percent due to the
2 104 percent we saw in the previous slide, correct?

3 A. Right. So you would have to go through this step. If
4 you take the 4.6, you reduce it by 9 percent, you will get
5 a number, which will obviously be less. I think it's about
6 4.3 or so. And then you would take that number and
7 increase it by 4 percent, which would get you to your net
8 earned premium number for 2016.

9 Q. Oh, I apologize. And then what's the last step leading
10 to the total?

11 A. You would multiply it by the profit margin of 20
12 percent, which is based on the combined loss ratio from
13 Mr. Bakewell's analysis.

14 Q. And so what is reflected in that lower column -- or
15 lower row?

16 A. That's just the total or the result of doing all that
17 math for each of the years for 2016 through 2020. And then
18 obviously in red font is the total, which adds up to about
19 8.1 billion in, after doing the math, for 2016 through
20 2020.

21 Q. And why is there no data in the columns for 2019 and
22 2020?

23 A. Because Mr. Bakewell didn't update his analysis.

24 Q. I think one more question. Under, under what
25 circumstances in your profession, in your field, would you

1 use old historical data, if at all?

2 A. It really depends, but typically, the valuation of a
3 business, you're typically looking out into the future in
4 terms of valuing a business to bring it back to present
5 value of today.

6 Another situation might be where you're trying to
7 just project out into the future whatever is your analysis
8 might be trying to reflect, maybe it's loss, and the
9 periods haven't happened yet, so you don't actually have
10 the actual data. So you're creating, you're creating the
11 future yourself based upon historical data.

12 But if you do have actual data, we would always
13 use the actual data for purposes of our analyses.

14 Q. So in your view using a profit margin from, say, 2016,
15 2017 or 2018 to calculate profits for 2019 and 2020, given
16 that they've already happened, that wouldn't be best
17 practices, would it?

18 A. No, I mean, especially when you have impacts like COVID
19 and things of that nature that might, you know, skew the
20 numbers for that year.

21 MS. KLIEBENSTEIN: No further questions. Thank
22 you, Mr. Zoltowski.

23 **CROSS EXAMINATION**

24 BY MS. GODESKY:

25 Q. Welcome back, Mr. Zoltowski.

1 A. Thank you.

2 Q. When you were here last week, you offered opinions
3 about the 21.3 billion dollars in gross written premium
4 generated by defendants, right?

5 A. Correct.

6 Q. And as we talked about last week, gross written premium
7 is revenue in the world of insurance?

8 A. Correct.

9 Q. And as Ms. Kliebenstein said, you left trial after you
10 testified, but it sounds like you reviewed some
11 transcripts; is that correct?

12 A. That's correct.

13 Q. Did you -- you were reviewing all of the trial
14 transcripts to keep up with everything or just some
15 excerpts?

16 A. I've reviewed most of it.

17 Q. So you've read the testimony of experts like
18 Mr. Whitener and Mr. Bakewell?

19 A. Yes.

20 Q. And as you discussed with Ms. Kliebenstein, you know
21 that defendants' damages expert, Mr. Bakewell, came here on
22 Friday afternoon and talked about costs and expenses that
23 he thinks should be deducted from your 21-billion-dollar
24 figure. Fair?

25 A. That was some of his testimony, yes.

1 Q. And then you just talked about some of the problems
2 that you see with his deductions, correct?

3 A. Correct.

4 Q. Okay. Now, the gist of Mr. Bakewell's position is that
5 in order to translate revenue to profit, you have to make
6 certain deductions, including reducing gross written
7 premium to net written premium, right? That's one thing
8 Mr. Bakewell says.

9 A. Yeah, that was his first step.

10 Q. And then his second step is, you need to deduct the
11 losses and expenses from that converted net written premium
12 amount, correct?

13 A. No, I don't believe that's correct. I think he -- the
14 next step was he went to net earned premium, which was
15 based on the accounting adjustment he did.

16 Q. And then he deducted the costs and expenses?

17 A. Correct.

18 Q. And you have offered certain criticisms of
19 Mr. Bakewell's math, but you have not put out an
20 alternative number to your 21 billion dollars in revenue
21 that accounts for all of Chubb's costs and expenses,
22 correct?

23 A. No, I have not.

24 Q. You're sticking with that all in 21-billion-dollar
25 number that we talked about last week in terms of the

1 official number you're putting out there, correct?

2 A. That was my opinion, yes.

3 Q. And you said just now during direct examination that in
4 your view, as far as economic damages go, it's really all
5 about defendants' use of Blaze. Do you remember saying
6 that?

7 A. I don't remember my particular words, but that sounds
8 about right.

9 Q. But the 21-billion-dollar figure you're putting out
10 there, we agreed last week, does not account for things
11 like Blaze's role in each of these computer applications
12 because you didn't look at that, right?

13 A. I'm not sure I understand your question.

14 Q. Isn't it true, Mr. Zoltowski, that the
15 21-billion-dollar revenue figure was not adjusted in any
16 way to account for Blaze's particular role in specific
17 computer applications at Chubb? Whether it was a big role,
18 a small role, whatever it is that Blaze was doing, you
19 didn't adjust the figures, correct?

20 A. I did not adjust the figures.

21 Q. You also don't deny that Chubb incurred costs and
22 expenses in selling these policies, correct? That
23 happened.

24 A. That's correct.

25 Q. It has to pay its employees. It has to pay customer

1 claims when it comes in. All those things are expenses,
2 correct?

3 A. Correct.

4 Q. Now, you reached the opinions you offered in this case
5 regarding that 21-billion-dollar revenue based on your
6 review of the testimony given by various witnesses, your
7 discussions with Mr. Whitener, and the information that
8 defendants produced about gross written premiums. Sound
9 right?

10 A. I think there was more to it than just that, but there
11 was a lot more that I looked at.

12 Q. But those were three things you considered?

13 A. Three of many, yes.

14 Q. And when you were here last week, you confirmed that
15 just like you set aside costs and expenses in giving that
16 21-billion-dollar number, you did not endeavor to offer
17 opinions on how much of that 21 billion dollars is actually
18 connected to use of Blaze as opposed to other things at
19 Chubb, correct?

20 A. Based on the information I had, that's correct. I did
21 not do that. I could not do that.

22 Q. And since there was some questions during your direct
23 examination about your views on an economic connection
24 between Blaze and revenue, I want to be very clear. You
25 are not here to opine that there is a nexus or connection

1 between Blaze and revenue, correct?

2 A. I spoke about an economic connection and that there is
3 value to Blaze Advisor earlier today, when Ms. Kliebenstein
4 was asking me questions, but I'm not sure I understand what
5 your question is getting at.

6 Q. You are not here, Mr. Zoltowski, to opine that there is
7 a nexus or connection between Blaze and defendants'
8 revenue, correct?

9 A. I provided information about my understanding and my
10 opinions as to the economic connection.

11 Q. That's not my question. I'm going to ask it one more
12 time.

13 A. Sure.

14 Q. You are not here to opine that there is a nexus or
15 connection between Blaze and defendants' revenue, correct?

16 A. I'm still not sure I understand your question; but if
17 it means from a legal perspective, I'm not a legal expert.
18 And many times in our cases we rely upon industry experts
19 who have better knowledge about, you know, that nexus that
20 you're talking about, but I have provided information and
21 opinions on the economic connection.

22 Q. Mr. Zoltowski, I've handed you a binder that has a copy
23 of your trial testimony from last week.

24 A. Okay.

25 Q. Do you see that tab?

1 A. I do.

2 Q. I want to direct you to page 1348 at line 24. This is
3 just last week, right?

4 A. Yes. That's correct.

5 Q. And I asked you at line 24, "You are not here,
6 Mr. Zoltowski, to opine that there is a nexus or a
7 connection between Blaze and defendants' revenue, correct?

8 "Answer: I understand that there is other
9 witnesses and information that will be doing that. I was
10 not asked to do that."

11 That was your testimony last week, correct?

12 A. That's correct.

13 Q. Did you meet with counsel for FICO before you returned
14 to testify today? Did you talk to them?

15 A. Yes.

16 Q. Now, you left this question of a nexus or connection
17 between Blaze and defendants' revenue to other people,
18 right? That's what you said in your testimony last week.

19 "There is other witnesses and information that will be
20 doing that." Correct?

21 A. From that perspective, yes. My report talks about the
22 value of Blaze Advisor in certain places and the economic
23 benefits of that software to defendants or in the insurance
24 industry itself.

25 Q. When you rendered your expert opinions in this case,

1 you specifically identified Mr. Bick Whitener as someone
2 who is going to be addressing this question of whether you
3 could find a connection between Blaze and Chubb's revenue.
4 Do you remember that?

5 A. Yes, I do. And typically industry experts are better
6 suited to do that because of their inherent knowledge of
7 the industry and their experience.

8 Q. An industry expert like Mr. Whitener?

9 A. If it's a software case, then that's where -- or
10 insurance case and that's his expertise, then yes.

11 Q. And before you reviewed and relied on Mr. Whitener in
12 offering your expert opinions in this case, you reviewed
13 his qualifications, you spoke to him, and you felt like his
14 qualifications spoke for themselves. Right?

15 A. Based on my layperson's review. I mean, I'm not an
16 attorney who retained him, so I don't really have an
17 opinion on his qualifications.

18 Q. But you felt like they spoke for themselves when you
19 read his qualifications back before you rendered your
20 expert opinions in this case, correct?

21 A. He was an individual who had a significant amount of
22 experience in the industry.

23 Q. And you, before you relied on Mr. Whitener's
24 qualifications in rendering expert opinions in this case,
25 you determined that his qualifications were quite

1 impressive. That was your view, right?

2 A. I don't know if I had a particular view on if they were
3 impressive or not. I felt that he had the qualifications
4 necessary to serve in the role he was serving in.

5 Q. Let's look at your deposition testimony from this case,
6 which is also in your binder. And this would have been
7 closer in time to when you had first reviewed
8 Mr. Whitener's qualifications, correct?

9 A. Correct. Yes.

10 Q. Let's look at page 65, line 11.

11 A. Okay.

12 Q. You were asked at line 11, "Question: What independent
13 analysis did you do to determine the reasonableness or
14 reliability of Mr. Whitener's assessments?

15 "Answer: My understanding is Mr. Whitener has
16 significant insurance experience and he is rendering his
17 own expert opinions in this matter. I found his
18 qualifications to be quite impressive, based upon his
19 experience, and his opinions relate to the insurance
20 industry and his expertise in that regard."

21 Do you see that?

22 A. I do.

23 Q. And you said that you reviewed Mr. Whitener's testimony
24 about the value of Blaze before you returned to court
25 today, correct?

NEIL ZOLTOWSKI - REDIRECT

1 A. I reviewed his testimony, yes.

2 Q. And do you still find Mr. Whitener's qualifications to
3 be quite impressive in terms of the opinions he is offering
4 about a connection between Blaze and Chubb's revenues?

5 A. I'm kind of laughing. I didn't realize I had such
6 strong opinions, but I am from Boston, so I typically do.

7 I think he does have the qualifications
8 necessary. He was in the insurance industry for many, many
9 years. I spoke with him on a few occasions, and I found
10 him to be particularly insightful.

11 MS. GODESKY: No further questions. Thank you.

12 THE COURT: Ms. Kliebenstein, any redirect?

13 MS. KLIEBENSTEIN: Yes, Your Honor.

14 REDIRECT EXAMINATION

15 BY MS. KLIEBENSTEIN:

16 Q. Mr. Zoltowski, you're not taking the position in this
17 matter that the defendants have no costs and no expenses;
18 is that right?

19 A. That's correct. And I said that during my testimony
20 the other day.

21 Q. Your issue is with the level of proof --

22 MS. GODESKY: Objection. Leading.

23 THE COURT: Sustained.

24 BY MS. KLIEBENSTEIN:

25 Q. What is your concern relating to the evidence we have

1 seen about costs and expenses?

2 A. I just haven't seen information that allowed me to feel
3 comfortable with performing an analysis that deducted costs
4 accurately and precisely.

5 Q. And you were asked about the percentage of, the
6 percentage of revenues that were Blaze Advisor versus what
7 makes Chubb Chubb. Do you recall that?

8 A. I faintly recall that, yes.

9 Q. And what are your concerns relating to -- well, do you
10 have any concerns -- do you have any concerns relating to
11 the nature of the proof on that question, what makes Chubb
12 Chubb?

13 A. Sorry. I missed one of your words in the middle of the
14 question, which is probably the most important one.

15 Q. That was a long question. I have to ask it again.

16 Do you recall, you were asked what percentage of
17 Blaze Advisor versus what makes Chubb Chubb?

18 A. Yes.

19 Q. And regarding the percentage that makes Chubb Chubb, do
20 you have any concerns relating to that proof, in
21 particular?

22 A. There is really no information to -- that allows me to
23 accurately quantify what that percentage might be. There
24 is just a lack of that type of information that would allow
25 me to do so.

1 Q. You've been asked a lot of questions about nexus, and I
2 wanted to get your thoughts, you know. You've been
3 involved in a lot of litigations. Do you, do you typically
4 always opine on nexus?

5 A. Not always and not typically. And like I said, it
6 really depends on the case. If there is an industry type
7 of expert or someone who is closer to -- if it's technology
8 based or what have you, they're usually the more qualified
9 person to do that type of analysis and render that type of
10 opinion.

11 Q. To take that next step, correct?

12 A. Correct.

13 Q. Now let's focus on just for a few questions what you
14 did do in this case.

15 Mr. Mayleben, can we pull up P1007A.

16 And this is Defendants' Ninth Supplemental Answer
17 to Plaintiff's Interrogatory Number 17. If we can move to
18 the second page and blow up the interrogatory itself.

19 Now, Mr. Zoltowski, what was your job as it
20 relates to this case and this interrogatory and the data
21 produced in connection with it?

22 A. I was asked to quantify the amount of gross written
23 premiums that was connected to Blaze Advisor and through
24 the use of the applications here listed in this
25 interrogatory.

1 Q. And so that revenue stream was a company-wide revenue
2 stream or was it something different?

3 A. No. It's something different. It's more targeted and
4 specific to these specific lines of business.

5 Q. In what way? What's its relationship? The revenue
6 reported under Interrogatory 17, what is its relationship
7 to Blaze Advisor?

8 A. It's connected in that it's the applications used Blaze
9 Advisor, like I said previously, to book, bind, to price,
10 to quote insurance policies and in certain instances to
11 comply with regulatory requirements.

12 Q. And the policies in particular reported under
13 Interrogatory Number 17, is it your understanding that they
14 touched Blaze Advisor?

15 A. Yes.

16 Q. And the second part of your opinion, we talked about
17 corporate structures, pooling arrangements?

18 A. Yes.

19 Q. Why did you do that work in this case?

20 A. It was showing the connection between the defendants
21 and their various subsidiaries and pooling entities that
22 all used Blaze Advisor and touched the gross written
23 premiums that are part of this interrogatory.

24 Q. So you identified revenue that touched Blaze Advisor
25 and then tracked it throughout the company, correct?

1 A. Correct.

2 Q. And was that a small task?

3 A. No. It was -- it's in question because I asked one of
4 my team to do something the other day, and I said I think
5 it will be easy, and they said nothing in this case is
6 easy.

7 MS. KLIEBENSTEIN: All right. No further
8 questions.

9 MS. GODESKY: Nothing further from me. Thank
10 you.

11 THE COURT: Mr. Zoltowski, you may be excused.
12 Thank you.

13 THE WITNESS: Thank you.

14 **(Witness excused.)**

15 THE COURT: Mr. Hinderaker?

16 MR. HINDERAKER: Plaintiff rests, Your Honor.

17 THE COURT: All right. Members of the Jury, with
18 that, we have concluded defendants' case in chief and the
19 plaintiff's rebuttal case. And as I indicated yesterday,
20 that will be the end of the admission of evidence in this
21 case.

22 As I also told you yesterday, the lawyers and I
23 have several hours of legal work that we can only do now
24 before you get the case. So we will do that for the
25 remainder of the day, and you will be back at nine o'clock

1 tomorrow to hear instructions and closing arguments and
2 then deliberate.

3 With that, we are in recess.

4 THE CLERK: All rise for the jury.

5 **(Jury exits.)**

6
7 **(In open court without the Jury present.)**

8 THE COURT: Be seated.

9 Here's what we're going to do. I'm going to have
10 Miriam print the list of exhibits, and I will supplement it
11 with the exhibits that were introduced this morning, and I
12 know which ones those are, I believe, but there might be a
13 little duplication. Regardless, I will read the list into
14 the record and then ask each counsel to confirm that that
15 list is accurate. It will take us a minute.

16 And then while we're waiting for the list to be
17 printed, let me ask the lawyers. When will you be ready to
18 argue the motions and then follow up with the charge
19 conference? Mr. Hinderaker?

20 MR. HINDERAKER: Should we come back at 1:30 or
21 2:00? How much time do we need?

22 THE COURT: That's certainly fine with me. I'm
23 leaving it to you folks because you have things to do. So
24 1:30 is fine?

25 MS. GODESKY: We're ready whenever you want.

1 THE COURT: Okay. You prefer 1:30?

2 MR. HINDERAKER: Sure.

3 THE COURT: That's fine. We will do it at 1:30.

4 I will just preview it for everyone. Be short on
5 the arguments. Okay? I mean, we will listen to them. I
6 will have to issue a ruling on the various motions, and
7 then we will do the charging and the verdict form.

8 **(Off-the-record discussion.)**

9 THE COURT: You can all stand and stretch if you
10 want.

11 MR. HINDERAKER: Could we have a minute to --

12 THE COURT: Pardon me?

13 MR. HINDERAKER: Could we have a couple minutes?

14 THE COURT: Yes. By all means.

15 **(Pause.)**

16 THE COURT: I think I'm ready when you folks are.

17 MR. HINDERAKER: Good.

18 MS. GODESKY: Your Honor, we just need
19 Ms. Guidero, because she has been tracking exhibits for us.

20 THE COURT: Yep. All right. Let's go back on
21 the record.

22 The way I'm going to do this: I will read in the
23 Court's record of what has been introduced. I'm starting
24 with defendants' numbers, and then I will let you know when
25 I change to plaintiff's; and then when I'm done with

1 plaintiff's, we'll reference the joint exhibits.

2 So -- and then at the end of this, obviously
3 we're asking each side to let me know of any errors or
4 omissions.

5 The following Defendants' Exhibits have been
6 introduced: 4, 8, 12, 14, 17, 30, 39, 58, 67, 77, 92, 96,
7 97, 99, 108, 109, 110, 113, 114, 116, 118, 125, 155, 156,
8 169, 172, 196, 199, 200, 202, 207, 208, 209, 210, 211, 212,
9 263A, 276, 280, 282, 283, 284, 293, 304, 309, 328, 330,
10 343, 355, 356, 357, 358, 359, 360, 361 and 362.

11 Counsel for Federal, do you note any errors in
12 that list or any omissions from that list?

13 MS. GUIDERO: Just one thing, Your Honor. I
14 didn't have D8 on the list.

15 THE CLERK: I'm sorry. It was admitted at P105.

16 THE COURT: Okay. So D8 was admitted as P105.
17 Okay.

18 Any other errors or omissions, Ms. Guidero?

19 MS. GUIDERO: Nothing from us. Thank you, Your
20 Honor.

21 THE COURT: Okay. Ms. Stradley?

22 MS. STRADLEY: I pulled up the list a little
23 late. I don't think so, Your Honor. I will double-check
24 as soon as I'm --

25 THE COURT: Okay. Can I go ahead, or are you

1 still checking?

2 MS. STRADLEY: Go ahead.

3 THE COURT: All right. Turning to plaintiff's
4 list, it is lengthier. 2, 5, 17, 18, 19, 20.

5 I'm going to do these slightly in a bunch. Just
6 bear with me for one second.

7 21 through 43 inclusive. 46, 47, 57, 60, 69, 73.
8 90 through 96 inclusive. 103, 105, 106, 107, 108. 110
9 through 113 inclusive. 116. 120 through 126 inclusive.
10 131, 133, 143, 144, 145, 147A, 151, 154A, 156, 158, 168,
11 171, 175, 176, 184, 185, 187, 188, 189, 191, 192, 193, 194,
12 195, 199, 204, 212, 216, 218, 226, 227, 282, 283, 284, 299,
13 303, 307, 309, 310, 311. 328 through 331 inclusive. 336,
14 337. 341 through 351 inclusive. 353 through 360
15 inclusive. 362 through 377 inclusive. 404A, 418, 504,
16 510, 511, 517, 518, 520, 521, 527, 540, 576, 655A. 839
17 through 850 inclusive. 857, 870, 871. 873 through 897
18 inclusive. 948, 956, 958, 960, 1002A, 1004A, 1005A, 1007A,
19 1008A, 1073, 1088, 1090, 1012 -- hang on -- 1112, 1113,
20 1114, 1116. 1139 through 1149 inclusive. 1151 through
21 1164. 1165A, 1171A, 1172A, 1174A. And then, lastly, 1177
22 through 1181 inclusive.

23 Ms. Stradley, any errors or omissions?

24 MS. STRADLEY: Yes. Thank you, Your Honor.

25 First, we had P171 on our exhibit list. I believe we may

1 have had redactions such that it should be 171 --

2 THE COURT: Hang on. I have it as 171 on my
3 list.

4 MS. STRADLEY: I'm sorry?

5 THE COURT: I have it as 171 on my list.

6 MR. DUBIS: Your Honor, today we talked about 171
7 and 171A. The 171A was the e-mail, and the 171 was the
8 attachment, both of them came into evidence.

9 THE COURT: 171A is in evidence. So let me amend
10 this list. So I have added 171A to the list.

11 Other omissions or errors?

12 MS. STRADLEY: Just one second, please. I did
13 not hear you say P1165. I may have missed it. That's on
14 our list, though.

15 THE COURT: Let me see if it's on the list.

16 THE CLERK: Was 1165 a placeholder and then it
17 became 1165A?

18 MS. STRADLEY: That could be.

19 THE COURT: It is on my list as 1165A.

20 THE CLERK: It's the computer with the source
21 code, right?

22 MS. STRADLEY: Okay.

23 THE CLERK: So do we need 1165 also?

24 MS. KLIEBENSTEIN: The thing that nobody has
25 wanted to decide this whole trial. So the computer has the

1 source code files on it, and the source code files are each
2 labeled with an exhibit number.

3 The computer will go back with the jury. I don't
4 care one way or the other if we mark the computer itself,
5 if that makes it easier for the Court to keep track of
6 things. I might suggest we give it a brand-new number,
7 because 1165 I believe is a particular source code version
8 on that computer.

9 THE COURT: Well, what I have on my list is
10 1165A. What is 1165A? Is that a particular file on the
11 computer?

12 THE CLERK: It's the computer.

13 MS. KLIEBENSTEIN: It's the computer.

14 THE COURT: It's the computer.

15 You realize, of course, that if it is kept in
16 this fashion and the matter is appealed, that if the Court
17 of Appeals wanted 1165A, you would be transmitting the
18 computer to the Court of Appeals?

19 MS. KLIEBENSTEIN: I do.

20 THE COURT: Okay. How many exhibits are
21 separately labeled on the computer itself with respect to
22 the software code?

23 MS. KLIEBENSTEIN: Around ten. I don't know the
24 specific number off the top of my head.

25 THE COURT: Let me ask the defendants. I'm

1 inclined to let it go as the computer just marked.

2 MS. GODESKY: I think that's fine.

3 THE COURT: Okay. So we will retain the marking
4 of the computer as 1165A. And any exhibits separately
5 labeled, but already contained on the computer, are in as
6 well, without my reading the list. Okay?

7 MS. KLIEBENSTEIN: Thank you.

8 THE COURT: Okay. Any other omissions or
9 corrections, Ms. Stradley?

10 MS. STRADLEY: None from me.

11 MR. ERBELE: I do have a question, Your Honor.

12 THE COURT: Yes.

13 MR. ERBELE: And that's regarding the exhibits
14 that were subject to Mr. Baer's offer of proof. Obviously,
15 they're not admitted; but just for preservation purposes,
16 should we note those?

17 THE COURT: We do need to preserve those. I
18 believe those are -- I know those are referenced in the
19 Court's written order on the motion, but we will
20 double-check that as well and before -- obviously, it's got
21 going to the jury.

22 MR. ERBELE: Mm-hmm.

23 THE COURT: But before the case is decided, we
24 will prepare a list of those as well and make sure that
25 those are tracked. Okay?

1 MR. ERBELE: Okay. Thank you, Your Honor.

2 MS. GUIDERO: I just have one thing, Your Honor.
3 I didn't hear you say P526.

4 THE COURT: P 5 what?

5 MS. GUIDERO: 526.

6 THE COURT: Well, it's on the list. I was pretty
7 careful to read it, but it's there.

8 MS. GUIDERO: Okay. Perfect.

9 THE COURT: Any others?

10 MS. GUIDERO: No. That's it. Thank you, Your
11 Honor.

12 THE COURT: Okay. Let me turn to the extensive
13 joint exhibit list. 1 and 2.

14 In addition, the Court has marked two exhibits.
15 1 and 2. 1 is the flipchart sheet. And I know that the
16 plaintiffs have photographed that and put a court exhibit
17 on that.

18 In addition, Court Exhibit 2 is the chart that
19 was shown again today with Mr. Zoltowski that was used
20 during the cross-examination of Mr. Bakewell.

21 And so those exhibits are preserved as well.
22 They will be in the possession -- when this case is done,
23 they will be -- the Court is going to keep a copy of it,
24 but FICO will be responsible for submitting that in the
25 event of an appeal.

1 Okay. Anything on exhibits, Mr. Hinderaker?

2 MR. HINDERAKER: No, Your Honor.

3 THE COURT: Okay. Thank you.

4 Ms. Godesky?

5 MS. GODESKY: No. Thank you for doing that.

6 THE COURT: Okay. Is there anything else we need
7 to take care of now before we break and then reconvene at
8 1:30?

9 MR. HINDERAKER: Would anybody object if we
10 reconvened at 2:00?

11 THE COURT: I do not object.

12 MS. GODESKY: That's fine.

13 THE COURT: Okay. We will reconvene at 2:00. It
14 will be my plan to be done with that between -- some time
15 between 3:00 and 4:00 at the latest, but remains to be
16 seen.

17 With that, we are in recess. We will see you
18 back here at 2:00.

19 **(Recess taken.)**

20 Tuesday, 3/7/2023, afternoon session.

21 * * *

22 2:05 p.m.

23 **IN OPEN COURT**

24 **(JURY NOT PRESENT)**

25 THE COURT: Let's go first with docket number

1 1128, Federal's motion regarding the foreign affiliates and
2 the third-party uses.

3 Mr. Metlitsky, are you arguing?

4 MR. METLITSKY: Yes, Your Honor.

5 THE COURT: Okay. Come on up. I will give you
6 five minutes. Don't worry, I'm not giving him six.

7 MR. METLITSKY: Sure. So I don't need, I don't
8 think, any minutes on the first one because we've talked
9 about it many times.

10 THE COURT: Yes.

11 MR. METLITSKY: If you have any questions, I'm
12 happy to answer them. And I would like to reserve the
13 right to respond to anything that I need to respond to, but
14 I don't think we have to talk about that.

15 THE COURT: Okay. That's fine. I appreciate it.

16 Mr. Hinderaker, will you be arguing?

17 MR. HINDERAKER: Not that one, Your Honor.

18 Ms. Stradley will be.

19 THE COURT: Ms. Stradley.

20 MR. METLITSKY: Oh, sorry. Just -- that was just
21 on the client and its affiliates.

22 THE COURT: Yeah.

23 MR. METLITSKY: I do want to argue the consultant
24 one, which is also part of that motion.

25 THE COURT: Okay. Argue the consultant one then.

1 MR. METLITSKY: Okay. So let me do that one. So
2 that one, as the court knows, turns on two different
3 issues. One is whether materiality is required for a
4 breach of Section 3.1, and one is whether there is
5 sufficient evidence for the jury to find materiality.

6 I'm happy to answer questions on the second one.
7 I'm sure the court has thought about that. I would like to
8 talk about the first one, if the court is considering
9 charging the jury that the contract might have, you know,
10 displaced the regular materiality rule.

11 THE COURT: I am -- I think you've seen the
12 instruction --

13 MR. METLITSKY: Yes.

14 THE COURT: -- that is likely to be --

15 MR. METLITSKY: Okay.

16 THE COURT: -- used. I am not going to instruct
17 them that the contract does provide a certain thing.

18 MR. METLITSKY: Right.

19 THE COURT: But my intention is to instruct them
20 that it either has to be material or the contract has to
21 provide otherwise.

22 MR. METLITSKY: So I would like to try very hard
23 to get you off of that --

24 THE COURT: Okay.

25 MR. METLITSKY: -- including based on the law of

1 the case. I don't have to do it now. I can do it during
2 the charge conference, whatever you would like.

3 THE COURT: Yeah, let's do that during the charge
4 conference.

5 MR. METLITSKY: Okay.

6 THE COURT: Okay?

7 Ms. Stradley.

8 MS. STRADLEY: I will start with the foreign
9 affiliate issue, and we have talked about it a lot, so I'm
10 just going to jump to I think the two concerns that the
11 court expressed in, earlier in the trial, which was
12 relating to the fact that there's no affiliates of Chubb &
13 Son and the fact that Chubb & Son, at least defendants
14 contend, do not have employees.

15 So both of those concerns arise from facts that
16 are extrinsic to the four corners of the license agreement.
17 We explained in our brief extensively that under the
18 New York law which governs this particular agreement,
19 ambiguity has to arise from within the four corners of the
20 agreement itself.

21 The first concern relating to affiliates, that
22 term is defined. Client is defined as well. And so any
23 ambiguity that's arising from affiliates is not from the
24 definition of the term itself. It's arising because of an
25 extrinsic fact, the fact being that Chubb & Son doesn't

1 have any affiliates.

2 THE COURT: So hang on. So I perceive in that
3 argument, though you are not saying it directly, but I
4 perceive that you are saying that Judge Wright's summary
5 judgment ruling found, I believe, that the term "client"
6 was ambiguous, and I believe that is directly in her
7 finding.

8 And I think -- so then I infer from what you are
9 saying that that finding is wrong because she relied on
10 extrinsic evidence to find an ambiguity in the phrase
11 "client."

12 MS. STRADLEY: I would frame it slightly
13 differently. I read her opinion as acknowledging that
14 "client" is defined as Chubb & Son, but then ultimately
15 finding the term "client and its affiliates" to be
16 ambiguous.

17 I think that the underpinnings from her finding
18 are based on her concern that she was unaware of case law
19 in which an unincorporated division could in fact be a
20 party to a contract. So we've put forth that law that now
21 shows that that can in fact be the case.

22 And so I think that that underpinning of the
23 concern relating to can this even happen, can a division in
24 fact contract, led her to this concern relating to
25 "affiliates," but she ultimately did find that it was

1 ambiguous. We would say "affiliates" is not ambiguous; she
2 got it wrong.

3 But the overall finding of her decision I think
4 was, was -- "tainted" is not the right word, but was
5 influenced by her unawareness of case law that we've now
6 put before the court.

7 THE COURT: And I've read all of those cases
8 closely. And where I think we may part company is
9 Judge Wright, that reference in her order said that she's
10 unaware of any authority that a, an unincorporated division
11 may contract independently.

12 And as I read the cases, including, I think it's
13 *Marantha*, obviously, but is it *Golub* or *Golub*, whichever
14 the name is.

15 MS. STRADLEY: I've been saying *Golub*.

16 THE COURT: That's probably what it is.

17 Those decisions to me seem fairly clear that,
18 yes, a division can be a contracting entity in the sense
19 that they can negotiate and sign a contract, but that even
20 when that happens, the legal entity is still the
21 corporation.

22 And that's what -- if my reading of the cases is
23 right, and I obviously think it is, if you accept that
24 premise, then I don't think there's a way around reading
25 client, Chubb & Son a division of Federal, as meaning

1 anything other than Federal Insurance Company.

2 So that's where I think it just really hits the
3 road.

4 MS. STRADLEY: And I just for the *Golub* case I
5 actually think it supports our position even maybe more
6 clearly than the *Marantha*. It's a quite dense case, but
7 I've read it a few times now trying to get my mind around
8 it.

9 And what actually happened in that case was, a
10 legally incorporated entity signed a contract, and the
11 language was signed "on behalf of," it used that language
12 "on behalf of," the unincorporated division.

13 And so the court actually found that the language
14 "on behalf of" the unincorporated division indicated that
15 the legal entity, when they signed it, wanted the
16 contracting entity to be that unincorporated division and
17 that in fact it was the unincorporated division that had
18 the obligations under the contract and was the contracting
19 party.

20 Now ultimately if there was a lawsuit, the
21 defendant would have been the parent corporation of that
22 division, but the fact that a corporation that was a legal
23 entity signed on behalf of an unincorporated division and
24 then the court still found that it was the unincorporated
25 division that was the contracting party, I think supports

1 that you, you can in fact have an unincorporated division
2 as the contracting party.

3 And in that case, it was not the parent that the
4 court found had, had the obligations or was, excuse me, or
5 was the contracting party. So I think that we've put the
6 law before you, and that's our position.

7 And with that in mind, we do think that the
8 extrinsic facts are what are creating the ambiguity and not
9 in fact the face of the contract itself.

10 THE COURT: Okay. Very well. Thank you.

11 Mr. Metlitsky, do you want to use your brief
12 rebuttal?

13 MR. METLITSKY: I mean just for a moment on the
14 *Golub* case.

15 THE COURT: Sure.

16 MR. METLITSKY: The division there was a -- the
17 division there was a conglomerate of limited partners, so
18 it was a bunch of legal entities together.

19 And on the extrinsic evidence point, we agree
20 with you that the court said that the contract was
21 ambiguous, so you can use extrinsic evidence.

22 I also don't think this is extrinsic evidence.
23 The question whether Chubb & Son, a division of Federal, is
24 in fact a division of Federal, which necessarily means they
25 can't have affiliates because it's not a legal entity, is

1 just a fact about the company, basic fact, the same way
2 that FICO is a corporation is an extrinsic evidence.

3 So in any event, it doesn't matter either way
4 because either the contract is ambiguous and you can use
5 extrinsic evidence, or this is just intrinsic evidence. By
6 the way, the result is the same.

7 THE COURT: Okay.

8 Ms. Stradley, anything further?

9 MS. STRADLEY: I would just say I think we put
10 forth, if they are saying extrinsic evidence comes into
11 play, to address your concern about the employee issue,
12 certainly defendants contend that there are not employees
13 of Chubb & Son, the division.

14 We put forth evidence in the brief that at least
15 there's sufficient evidence to get to the jury as to
16 whether there are employees of Chubb & Son, including their
17 own annual reports that identify officers and personnel of
18 Chubb.

19 & Son.

20 THE COURT: Okay. Very well. Thank you.

21 MS. STRADLEY: And then I was unclear about what
22 we're doing about the 3.14 termination immateriality. Are
23 we addressing that at the charging conference? Is that
24 what we're doing?

25 THE COURT: We are. Yes, on the issue of whether

1 the third party use can lead to both a breach and a
2 termination.

3 MS. STRADLEY: Okay.

4 THE COURT: Okay. All right. So that's Docket
5 1128.

6 Let's turn to Docket 1136 or 1135, disgorgement.

7 MR. METLITSKY: So, Your Honor, on this one I do
8 want to take a few minutes to discuss, because I think we
9 have a legal disagreement and a factual disagreement, which
10 I don't think really is a disagreement. But there is a
11 legal disagreement.

12 I think everyone agrees on what the basic
13 standard is, the "contributed to" standard, but I think
14 there is a legal disagreement about what it means for
15 something to contribute to revenue.

16 It seems to me that they think that you can say
17 something is valuable, something is important, something is
18 significant, and a jury or the court can conclude from that
19 that it contributes to revenue.

20 I do not think that's the law. If you look at
21 the *Andreas* case, Audi TT coupe case, if you look at the
22 kind evidence the court accepted there, it was all evidence
23 that was tied to sales, right. So Audi was very
24 enthusiastic with its dealers about this ad, the dealers --
25 and so was telling them, take more cars because you are

1 going to sell more cars.

2 Audi's revenues, actual revenues during the time
3 the ad with the infringing content ran, was higher than its
4 projected revenues for that period, et cetera, et cetera,
5 right? It was all tied to sales.

6 I'm not sure I'm aware of a case where you don't
7 actually have to tie the infringing use to actual revenues.
8 And in fact, when -- if all you have to do is say something
9 like, you know, this was an important component of the
10 business, it seems to me that the consequence is shifting
11 the burden from them to us.

12 And there are cases having to do with software,
13 like the *IBM* case and the *Complex Systems* case, where the
14 testimony is very, very similar, if not identical, to the
15 testimony here which is, this is a very important component
16 of the business. It's significant, you know. It's
17 meaningful. It plays a meaningful role in the business.

18 And the courts there made clear that that is not
19 enough. That is not enough to satisfy the causal nexus
20 test.

21 And here -- and so that's what I think the law
22 is, that they actually have to tie the infringing use to
23 revenue and not to importance and those kinds of
24 adjectives.

25 And then there's the evidence, right, and you

1 know we've laid this out, and Your Honor has been sitting
2 here listening to it. So you heard Mr. Baseman say he
3 couldn't tie it to revenue. I can go through all the fact
4 witnesses. I think that was pretty clear.

5 And everybody agreed, I think, that the main
6 witness that they were relying on is Mr. Whitener. And
7 Mr. Whitener conceded that he couldn't tie it to revenue.
8 In fact, Mr. Hinderaker in the colloquy with Ms. Godesky
9 about his qualifications said that, you know, just to quote
10 him, "that he's not a Blaze Advisor expert and he's not
11 going to connect Blaze Advisor to the selling of insurance.
12 That's revenue."

13 Right? And the reason, I think, Mr. Hinderaker
14 said that is because Mr. Whitener didn't know anything
15 about Blaze Advisor. And so how could he connect the use
16 of Blaze Advisor to revenue? And so it seems to me that
17 there's a complete failure of proof on this issue, and
18 there's good reason not to ask the jury about it, because
19 they've already heard about inflated numbers, but hearing
20 about it in summation is all the more prejudicial.

21 THE COURT: Let me ask you this: I'd like you to
22 explain a little bit what your view of causation or causal
23 nexus would require in a case like this. And let me tell
24 you what I think I'm inferring from your argument.

25 I infer from what you said that it's your

1 position that in order to establish the causal nexus, what
2 FICO would need to show is that the applications that used
3 Blaze Advisor, that touched these policies, had to touch
4 those policies in the presale, if you will, at a minimum.

5 You may disagree with this entirely, but they
6 have to touch the policies before the top policies are sold
7 and that somehow that fact would have to be known to and
8 important to customers. That's what I'm inferring your
9 argument to be.

10 MR. METLITSKY: That's one way to do it. If I
11 can just take a step back.

12 THE COURT: Sure.

13 MR. METLITSKY: There has been dispute in the
14 cases about whether the standard for direct and indirect
15 infringement cases is the same or different. And the court
16 held they're the same. The standard, the standard is the
17 standard. But of course it's harder to satisfy in indirect
18 cases.

19 The fact that they are relying on an infringing
20 use, where it's hard to demonstrate a connection to
21 revenue, does not mean that their burden to demonstrate a
22 connection to revenue is lower.

23 Most of these case are about promotional
24 material, the *Audi* case, the *Polar Bears*, *Mackie*, case all
25 those cases are about promotions. And so at least the

1 infringing use is like touching the customer.

2 This is somewhere, you know, in the back room of
3 the business. And so, you know, that's their argument, but
4 they still have to demonstrate the same connection to
5 revenue that anybody else does, whether it's, you know, a
6 direct infringement case or indirect infringement case.

7 So, yeah, it may be hard as cases like *IBM* and
8 *Complex Systems* hold when it's, you know, it's a software
9 component of a big, technological enterprise, but I
10 think -- so with that said, I think the answer is more or
11 less decided in the summary judgment decision.

12 I think what Judge Wright said was, first, there
13 was this thing that you were talking about touching. I
14 think that's the --

15 THE COURT: Yeah.

16 MR. METLITSKY: -- phrase we've been using, it's
17 got to touch. But that is not enough, and it can't be, it
18 touches Blaze, plus Blaze is good, right?

19 It has to be, it touches Blaze. That's number
20 one, and then it contributes to revenue. And what
21 Judge Wright cited for it contributes to revenue was
22 Mr. Whitener's opinion.

23 And, you know, then Mr. Whitener said, no, I
24 can't tell you whether it contributed to revenue. So
25 that's the difference between his expert report and his

1 trial testimony.

2 And under the summary judgment decision, I mean,
3 you know, first of all, this is understand Rule 52, so I
4 don't have to satisfy the, you know, summary judgment
5 standards essentially. But I think we satisfy it, because
6 there just isn't any revenue.

7 Excuse me. Well, yeah. There isn't any revenue
8 tied to Blaze Advisors. There is no evidence of it at all.

9 THE COURT: Okay. Thank you.

10 Mr. Hinderaker.

11 MR. HINDERAKER: My turn?

12 THE COURT: Yep.

13 MR. HINDERAKER: I think that the defendants'
14 position confuses many things.

15 THE COURT: Including the court.

16 MR. HINDERAKER: So let's separate, let's
17 separate out a couple things, if we might. This notion of
18 being tied to revenue: As the case law says, *Andreas* says,
19 as Judge Wright says, you need to have a reasonable
20 relationship to the revenue that you are claiming.

21 I think it's more than self-evident that we have
22 more than a reasonable relationship. We have the
23 defendants' admissions. So we have the interrogatory
24 number 17 that asks directly, revenue and policy counts for
25 everything that touched -- or that was connected to the

1 language in the interrogatory, was connected to Blaze,
2 using Blaze Advisor.

3 And Mr. Harkin's testimony, if there was any --
4 what's the right word? If in the defendants' answers to
5 that interrogatory, where they sort of rephrase a little
6 bit what we were asking, if they were trying to create some
7 crevice, Mr. Harkin said a few times in his testimony, "I
8 was responsible for collecting that data. That data
9 identifies each policy and the associated revenue, that not
10 only went through the application, but used Blaze Advisor."

11 So Mr. Zoltowski, in his expert opinion and his
12 use of that data, sorted that data by writing companies,
13 sorted that data useful ways for understanding the total
14 amounts and by years.

15 But the evidence of the direct connection between
16 the infringement and the revenue is the defendants'
17 admissions.

18 Now the defendants want Mr. Whitener to do too
19 much because Zoltowski took care of the dollars and the
20 connection to revenue with Mr. Harkin and the interrogatory
21 answers.

22 Mr. Whitener then says, when you -- and let's
23 back up again. These applications are used for the purpose
24 of selling insurance. And Mr. Whitener then is described,
25 from not only the defendants' own documents but from his

1 own experience in the industry, why having these benefits
2 from the technology contributes to the sale of insurance.

3 Another element of the positioning here is that
4 we're not talking about those insurance policies that did
5 not use Blaze Advisor. So like we heard, was it yet today,
6 yesterday, Mr. Schraer talking about all of the high touch
7 underwriting that he might do.

8 Well, fine, but we're talking about the renewals
9 that don't have any human touch, which was the CSI Express
10 application. So we're talking about those policy that is
11 touch, that touch Blaze Advisor.

12 The defendants are citing the same cases that
13 they cited to Judge Wright. Well, you can't -- and
14 Judge Wright said, I reject these cases. FICO's proof is
15 not undifferentiated. It is differentiated. We're only
16 asking for the revenue under the 504(b) standards.

17 THE COURT: FICO has -- first of all, let me just
18 say on the record, I pick the low hanging fruit. I didn't
19 mean to -- I was not being serious. Your argument,
20 Mr. Metlitsky, does not confuse the court. Okay?

21 MR. METLITSKY: I didn't think you were being
22 serious, Your Honor.

23 THE COURT: FICO has limited its universe to
24 those policies which pass through applications that use
25 Blaze and that those policies themselves in some way used

1 Blaze.

2 MR. HINDERAKER: Yes.

3 THE COURT: What defendants seem to be arguing,
4 to put it in slightly different terms, is that's just a
5 narrowed down version of general overhead. That's like
6 saying, well, you know, these policies pass through a
7 certain department.

8 And they're saying you have to distinguish -- you
9 have to -- that may be fine for discovery purposes, but to
10 get to the jury, you have to further refine that universe
11 in some way connecting the policies to, I think, the sale
12 as related to the customer.

13 MR. HINDERAKER: It's a rather -- let's just take
14 the various policy administration systems. The easiest
15 example for me is the renewals, which because of the use of
16 technology don't involve the customer. Automatically --
17 and the testimony -- I mean, there's testimony of in fact
18 the defendants enjoyed a greater percentage of renewals
19 because they were using technology to be able to do those
20 renewals.

21 It's hard for me to imagine any circumstance
22 where there's not a more direct connection to the customer
23 than when revenue is being generated as a result of the
24 transaction.

25 The testimony in fact, because of the technology,

1 the defendants were able to get to market faster with new
2 products, get to market faster to take opportunities that
3 they were not otherwise able to capture, like the
4 \$25 million opportunity with Premium Booking.

5 Those are things that happened and generated
6 revenue because of the technology.

7 THE COURT: Their argument in part, I think, also
8 says -- even if we grant you that, there is language in *IBM*
9 and *Complex Systems* that says, again not verbatim, but to
10 the effect that you have to show that somehow that's unique
11 to Blaze as distinct from other market alternatives.

12 MR. HINDERAKER: I disagree with that, Your
13 Honor, completely because that's to say, I could have
14 infringed somebody else's business rules management
15 technology. They chose to infringe ours. They chose to
16 take the advantages that our technology provided to their
17 sale of insurance.

18 They chose to take the speed from Blaze Advisor.
19 They chose to take the agility from Blaze Advisor. They
20 chose to take the consistency and decision-making. They
21 chose to have smarter decision-making on the underwriting
22 side to sell insurance, and they chose to do that with our
23 technology.

24 It's not an issue of whether they could have done
25 it with somebody else's technology, you know. After some

1 four years of use, they indeed did transfer to jural.
2 That's not the point.

3 The point is, until they did that, they chose to
4 treat Blaze Advisor like their own and infringe and
5 generating the revenue as a consequence.

6 To say it's back office is to be quite
7 disingenuous of what it is. How many of our last witnesses
8 in the last few days, do I use CSI Express in the renewals?
9 Yes, I do. Why did we use DecisionPoint? To sell
10 policies. Some agents don't like it; others do.

11 Policy counts go up year over year. We're not
12 asking for revenue from the agents that don't use it; we're
13 asking for revenue from the agents that do.

14 So it's, I think that it's not -- these insurance
15 companies are in the business of selling insurance, and
16 that's what this technology was used for.

17 What did Mr. McCarter say? Technology
18 contributes to the success of insurance policies. What did
19 he say about renewals? Customer retention is very
20 important. When I asked him a question about using Blaze
21 Advisor, his answer was, well, it might be true and might
22 not be true if it's just one -- you know, his answer was
23 always, well, the one customer.

24 And so I asked him, well, can I get your answer
25 on one confident? Let's say it's a thousand customers.

1 You know, overall, if you can do the renewals faster, do
2 you have a higher retention rate? And he had to say yes,
3 because the technology gives that ability to do.

4 We've had many people say, well, underwriting is
5 a very intensive relationship business. Does having
6 automation and scale create the opportunity for the
7 underwriters to go sell? Yes, it does. Is that a
8 contribution? Yes, it is.

9 Our burden under the act is to show that it
10 contributes at least in part, and it does, Your Honor. I
11 think there's -- in my judgment, there's more than enough
12 evidence to go to the jury.

13 Frankly, if when I look at the *Andreas* case and I
14 have an advertisement that's running at the same time that
15 TT coupes are being sold and that is a sufficient
16 connection, we have much more than that in this case.

17 THE COURT: All right. Thank you,
18 Mr. Hinderaker.

19 You may briefly Mr. Metlitsky.

20 MR. METLITSKY: Briefly on *Andreas*, we talked
21 about already how it's directly tied to revenue.
22 Interrogatory number 17, this whole idea of touching Blaze,
23 okay? That's the equivalent of saying if somebody was
24 violating copyright a font, okay, and invoices use that
25 font and the interrogatory asked how many, you know,

1 invoices used the violating font, and it would be
2 \$21 billion.

3 Obviously that does not satisfy the burden. It's
4 maybe one step in satisfying the burden, but you're not
5 showing that the font is actually contributing to revenue.
6 You're just showing that it was used in an invoice.

7 You know, you could make -- do that with
8 anything, chairs. How many, you know, how much do chairs
9 contribute to revenue? You know everybody that sells
10 things sits on chairs. I mean, that doesn't satisfy the
11 standard. You need to take the next step.

12 And so what I heard Mr. Hinderaker say was,
13 technology is important. That's true. That's not about
14 Blaze Advisor. He talk about the applications that use
15 Blaze Advisor, but that's not Blaze Advisor. And that's
16 the whole point of those *IBM* cases and *Complex Systems*.

17 When you're talking about software, that's a
18 little piece of a big technological enterprise. You can't
19 just say the technological enterprise is important and this
20 is an important -- the technological enterprise drives
21 revenue. This is an important piece of the technological
22 enterprise; and therefore, we've satisfied our burden
23 because, again, the consequence of that is just, you're
24 always going to be able to satisfy that standard because,
25 you know, any little piece of a big money-making enterprise

1 is, you know, always going to be a little piece of it,
2 whether it drives the revenue or not.

3 And so the consequence of not forcing them to
4 show that that little piece drives the revenue, as opposed
5 to the application as a whole, is to shift the burden to us
6 to say all the revenue that touches Blaze is, you know,
7 satisfies their standard, and then we have to do the
8 deductions and all the rest of it. And that is not the
9 law.

10 And then one last thing I would say is,
11 Judge Wright didn't reject those cases. Judge Wright held
12 that not only did they do the touching Blaze thing, which
13 was the first part. That's when she said it was not
14 undifferentiated, but she also said that they put on
15 evidence in the form of Mr. Whitener's report that it
16 contributed to revenue.

17 Two different points. Not the same point, two
18 different points. And so I think the question for the
19 court is whether that second point stood up at trial. And
20 I think the answer, based on all the admissions of their
21 witnesses, is no.

22 THE COURT: All right.

23 Mr. Hinderaker, you may have the last word.

24 MR. HINDERAKER: One last word.

25 THE COURT: Yeah.

1 MR. HINDERAKER: It was tough too. I think the
2 defendants characterization of what Blaze Advisor -- I
3 think the defendants' characterization by way of examples
4 which have such a different font, my point is what was the
5 purpose of their use of Blaze Advisor? The business
6 purpose of the use was to sell insurance. That's quite
7 different.

8 And in terms of the burden of proof, I think the
9 defendants have it mostly upsidedown.

10 The plaintiff's burden of proof is to prove this
11 connection to revenue from the infringement at least in
12 part. What is the defendants' burden to do? Not only
13 prove the expense deductions that are appropriate, but also
14 to prove all of the other factors that contributed to the
15 revenue, in addition to the, in addition to the technology,
16 in addition to the applications that, the policies that
17 touch Blaze Advisor.

18 So this notion of Mr. Whitener couldn't say
19 what's the impact, that's to shift the burden of proof on
20 us to measure that. When they ask the witnesses, did you
21 measure that, that's to shift the burden of proof.

22 So they're more subtle this go-around than they
23 were with Judge Wright, but they're asking this court to
24 make the same error that they asked Judge Wright to make,
25 that is to reject the burdens of proof of *Andreas*.

1 THE COURT: Thank you, Mr. Hinderaker.

2 All right. Let's turn to Docket 1148, FICO's
3 motion for a judgment as a matter of law that ACE American
4 infringed.

5 MR. HINDERAKER: I would say the proposition of
6 the motion is that let's assume, let's assume the license
7 agreement with, I would say Chubb & Son, you might say
8 Federal, let's assume the license agreement was not
9 terminated and it's still ongoing.

10 What is the, what is the mechanism by which ACE
11 American, a separate legal entity, could be the one using
12 the software now and -- well, what's the mechanism by which
13 they could be using the software now with FICO's
14 permission?

15 And frankly, I found the response to our motion
16 to be fairly kitchen-sinky in the sense there's many
17 different, if not this, then that and alternatives, and
18 I'll get to those eventually, I think. But I would just
19 like to talk about 10.8 first.

20 So the first sentence is neither party, you know,
21 can transfer or assign without the consent of the other.
22 So that's a straight traditional document of assignment.
23 And that didn't happen here. Nobody disputes that.

24 And so then we go into the second sentence, which
25 is, which is if the client undergoes a change of control,

1 if the client acquires or is acquired by another company,
2 or if the client goes through a reorganization or process
3 of somebody else's business, notice that it's always "the
4 client," "the client," "the client."

5 In that second sentence, there's no transfer of
6 rights. The client is still the licensee. Now, it's
7 considered to be an assignment. It's a deemed assignment,
8 considered to be an assignment, so that it can be subject
9 to this section.

10 And therefore as subject to this section, FICO
11 can't have an opportunity to consent whether Blaze Advisor
12 will be used under these very different circumstances.

13 So you heard that when the license agreement is
14 originally made, 2006, the client is of a certain kind.
15 Here, it's within the Chubb Corporation. The pricing is
16 reflective of that use and that size organization. And
17 that's the 2006 circumstances.

18 In 2016, the client, the client, the client, in
19 the second sentence, became -- went through a very
20 significant change of circumstances. The client was
21 acquired; the client was -- went into a change of control.
22 Those are the two that applied.

23 And as a consequence, the circumstances of the
24 original bargain in 2006 are no longer the circumstances.
25 They are 2016 circumstances, from pricing within a

1 \$12 billion organization to pricing within a \$30 billion
2 organization.

3 So in all of that, there's still no transfer of
4 rights from the client to anybody else, period. It's
5 always the client.

6 Now in the argument now it's, well -- the
7 argument now is that, call the client Federal. Federal was
8 acquired by ACE American. Well, the first point about that
9 is, it's simply not true. Is ACE American the parent above
10 everything else? Of course, it is.

11 Federal by the stipulated, uncontested facts of
12 number 15, became a wholly-owned subsidiary of ACE INA
13 Holdings, Inc.

14 So Federal was acquired, and it became
15 wholly-owned by somebody else, ACE INA Holdings Inc.
16 That's not ACE American.

17 And still the license agreement is with Federal,
18 the client. That hasn't changed either.

19 So how is it that, how is it that the argument
20 goes that ACE American can use the software as a magical
21 assignment? Well, let me just -- we've seen this many
22 times (indicating).

23 We have to believe that this is an organizational
24 chart, to make any of the argument of the defendants' work
25 that ACE American has rights because the truth of the

1 matter is, is that -- and it's a little harder to see
2 here -- is that when you look at the, when you look at the
3 corporate structure, ACE American goes up this chain
4 (indicating).

5 Federal Insurance Company goes up this chain
6 (indicating). Ultimately, they get to Chubb Limited. But
7 they're on separate chains, and never -- and as a
8 consequence, ACE American is not, never has been, and
9 cannot be an affiliate of Federal as defined by the license
10 agreement.

11 Federal does not own 50 percent or more of the
12 voting stock of ACE American. The only connection that
13 they have is that they are both owned by Chubb Limited.

14 So now we're back into, how can you use the
15 mechanisms of paragraph 10.8 to give ACE American rights to
16 use Blaze Advisor? And you can't unless you -- well, you
17 simply can't, because there is no transfer of rights under
18 the second sentence.

19 It's just a different circumstance with the
20 client that causes a revisiting of price. A deemed
21 assignment is not an assignment. If it was an actual
22 assignment, we'd be in the first sentence.

23 And so the argument then becomes, well, Federal
24 wasn't acquired. The argument becomes Federal was acquired
25 by Chubb Limited. Well, no, it wasn't. It was acquired by

1 ACE INA Holdings, Inc., which was, you know, down the chain
2 from Chubb Limited.

3 So the argument simply doesn't fit the
4 circumstances. The brief that we presented to you also
5 looks at the law of judicial admissions, and this argument
6 is another argument that was the creation of counsel at the
7 beginning of this trial.

8 Up until February 15th, the argument of the
9 defendants is that the client was always Federal, it's
10 always Federal, it's always Federal. And the way
11 paragraph 10, the second sentence reads, indeed that's
12 true. The client never changes. It just goes through a
13 change of circumstance.

14 The defendants are bound by that. Now they want
15 to not be bound by that by saying we're making a legal
16 argument. They were making a statement of fact, who's the
17 client? Federal, in advance of a legal argument, but now
18 we're facing at this time in the trial a very different
19 argument that they should be precluded from making under
20 the law of judicial admission.

21 And then in the kitchen sink notion, now we're
22 arguing, well, maybe it was a reorganization because --
23 maybe it was a reorganization because Federal lost its
24 employees. Well, that's the first one too. And paragraph,
25 the second sentence says or, you know, a reorganization

1 requires the rights to process another person's business.

2 So again, when you look at the rationale for the
3 sentence, it says, well, does the client circumstances
4 change? So it's going to be using Blaze Advisor more. The
5 value proposition goes up. If there was a reorganization,
6 it was a reorganization of Federal to go out of business
7 and not process with Blaze Advisor at all. And, hence,
8 that's why ACE American became a user.

9 I think this circumstance is much like Pamela
10 Lopata said on her testimony, much like Mr. Folz said
11 today. I woke up one morning, and I had a different -- I
12 had a different employer.

13 We had a license agreement with Chubb & Son or
14 Federal, depending on the point of view, and one day ACE
15 American woke up and said, Well, we're just going to use
16 your, we're just going to use your software as if we own
17 it. But there's no way under the law or under this
18 provision that they acquired any permission from FICO to do
19 so.

20 So their argument that at the trial is that
21 somehow paragraph 10.8, when it considers a different, a
22 change of circumstance of the client, somehow transforms
23 that change of circumstance of the client to, a transfer to
24 somebody else.

25 And, of course, they have to argue that it was a

1 transfer to the parent corporation of all Chubb Limited,
2 when in fact the entity that the, that owned Federal, the
3 change of control of Federal was much lower down in the
4 chain, ACE INA Holdings, Inc.

5 So in summary to shorten it up, you have to
6 accept the fact that the separate jural entities of this
7 complicated company are mean meaningless and that you have
8 to believe that this is an organizational chart, and we can
9 ignore all those separate companies, so that whatever Chubb
10 Limited does through any of it's a hundred and -- or 220,
11 whatever, subsidiaries, it's all for one and one for all,
12 and the license agreement, what are those words?

13 So I think that there is, frankly, there's no
14 evidence in this case. There's certainly no evidence of an
15 assignment. There's no evidence of a corporate structure
16 that fits, that enables ACE American to be an affiliate of
17 Federal under any, under any definition of the terms of
18 "affiliate" in Amendment two.

19 That's undoubtedly clear. Must be owned, Federal
20 must own 50 percent, Federal must own 50 percent of ACE
21 American. Federal does not. Undisputed fact. Can't be
22 disputed. They're not even in the same chain.

23 So thank you.

24 THE COURT: Thank you, Mr. Hinderaker.

25 Mr. Metlitsky, let me ask you a question --

1 MR. METLITSKY: Yeah.

2 THE COURT: -- at the outset. January 1, 2017,
3 right? The Federal Insurance Company employees become
4 employees of what corporate entity?

5 MR. METLITSKY: ACE American, I believe.

6 THE COURT: Okay.

7 MR. METLITSKY: Yeah, so I think I need to unpack
8 this a little bit --

9 THE COURT: Okay.

10 MR. METLITSKY: -- because I know the explanation
11 of our theory that Mr. Hinderaker gave is not exactly
12 right.

13 So I'm going to use the original names of the
14 companies because it gets real confusing when you start
15 changing ACE to Chubb.

16 So what happened on the first day of the merger
17 was that ACE Limited purchased Chubb Corporation, acquired
18 it. And so there was a change of control at Federal. It
19 used to be owned by Chubb Corporation, and now it was
20 ultimately owned by ACE Limited.

21 The next day, through some intercompany stuff, it
22 became the immediate subsidiary of ACE INA Holdings, and
23 that company's parent was ACE Limited. It doesn't matter
24 which of those ended up being the change of control for
25 purposes of our theory, and I'll explain why.

1 So recall that there are two competing
2 constructions of Section 10.8 that Judge Wright said were
3 both reasonable. So I think the way that Mr. Hinderaker
4 was describing it assumes that they're right about what it
5 means.

6 The only thing that matters for purposes here is
7 that we're right about what it means because the only
8 way -- the whole premise of this argument is that we win as
9 to whether the termination was proper. And so there's no
10 copyright infringement by Federal.

11 Their argument is that there still must
12 necessarily have been copyright infringement by ACE
13 American, right?

14 So under our reading of Section 10.8, the second
15 sentence has nothing to do with the first sentence. The
16 first sentence is about real assignments, and you need a,
17 you know, permission for that. The second sentence, as
18 Judge Wright held was reasonable, is that a change of
19 control or any of the other events results in a deemed
20 assignment.

21 Now a deemed assignment is still an assignment.
22 An assignment means you are assigning something from one
23 entity to another entity. So the fact that it uses the
24 word "client" in there doesn't mean that there's no
25 assignment if there's a deemed assignment.

1 It means that if the client engages -- if there's
2 a change of control of the client or if the client is
3 merged with or acquired by another company, et cetera,
4 et cetera, that results in a deemed assignment, and we say
5 you don't need consent for that. You only need consent for
6 expanded use.

7 And one of the arguments we want to put before
8 the jury, which is consistent with a letter that
9 Mr. Carretta wrote right at the beginning of all this, is
10 that the assignment we're talking about is to the acquiring
11 company, right? That's the consequence of our construction
12 of the agreement.

13 If you don't need written consent and there is
14 just a deemed assignment, what the agreement means, we'll
15 argue to the jury, is that there has been an assignment as
16 a matter of law. The assignment has to be from somebody to
17 somebody, and the "from somebody" is Federal and the "to
18 somebody" is, you know, ACE Limited or ACE INA Holdings.
19 It doesn't matter. Okay?

20 THE COURT: Hang on. Bear with me. All right.
21 I'll just do it from what you just said.

22 MR. METLITSKY: Mm-hmm.

23 THE COURT: Your point, your construction of 10.8
24 is that if the client undergoes some event that's deemed an
25 assignment, boom, we're now in section -- or we're in

1 sentence two. If that happens, then no expanded use may be
2 made.

3 But I purposefully phrased that in the passive
4 voice because Mr. Hinderaker's argument is, client may make
5 no expanded use.

6 MR. METLITSKY: That's right.

7 THE COURT: And so your argument then turns back
8 to, once that event occurs, it necessarily carries with it
9 a redefinition of "client."

10 MR. METLITSKY: Yeah. So this is Judge Wright's
11 explanation of our reasonable, you know, construction. The
12 plain language of this clause reflects that after a deemed
13 assignment occurs, such as Chubb Corporation's merger,
14 Federal is prohibited from making expanded use of Blaze
15 Advisor without first obtaining FICO's written consent.

16 But that doesn't mean that Federal is the client.
17 There's been an assignment, right? There's been an
18 assignment. And an assignment has to be from somebody to
19 somebody else. That's the only meaning of assignment, or
20 at least it's a plausible meaning of assignment that we can
21 argue the to the jury, right?

22 So who would it be to? In the context of a
23 change of control, I assume it's got to be to the new
24 controlling entity. And so if we're right about that,
25 right, that there's been an assignment to either ACE

1 Limited or ACE INA Holdings, then that entity is the
2 client, and all of its affiliates now have the right to use
3 the software so long as there's no expanded use, right?

4 And both Federal and ACE American are affiliates
5 of both ACE Limited and ACE INA Holding. That's the,
6 that's the basic argument.

7 And again Mr. Carretta's letter at the, you know,
8 we've seen those letters going back and forth. His
9 argument was that the assignment was to at the time it was
10 called Chubb Limited, because the name had already changed,
11 but, you know, the big company, the one at the very top.
12 We just want to present that argument to the jury, and if
13 we're right about that, then ACE American is a, is a
14 licensee.

15 And then we have to -- oh, and then there's this
16 argument that there's some kind of judicial admission,
17 which is totally wrong. We were making a legal argument
18 that there wasn't a change of control, a legal argument
19 that was eventually rejected by the court.

20 And what we said was, there wasn't a change of
21 control. Federal itself remained the same following the
22 merger. So there was no change to the entity of FICO's
23 client.

24 The implicit point there was that if there was a
25 change of control, as I think was made clear in the summary

1 judgment opinion, then Federal would no longer be the
2 client. Somebody else must be the client. Well, who could
3 it be? Right? So that's the first argument.

4 There's no judicial estoppel there or anything
5 like that, right, because the court didn't accept our legal
6 position that there was no change of control. So we're not
7 precluded from making a new argument now.

8 And then we have two fall-back arguments. If you
9 don't think that for some reason there was a deemed
10 assignment on, you know, whenever the first merger
11 happened, when ACE American took over all the employees of
12 Federal, how could that not be a reorganization? And in
13 the context of reorganization, it's like the new company
14 must be the deemed assignee, otherwise what does this
15 clause even mean on our reading, right?

16 In that case, ACE American would be the licensee
17 also. And then the third argument is, to the extent that
18 none of that is true, and, you know, Federal breached the
19 license by allowing ACE American to use it, we should be
20 able to argue to the jury that there wasn't a material
21 breach because all that happened was the name of the
22 company changed.

23 So, Your Honor, these are all arguments we want
24 to make to the jury. That's all. And they're certainly
25 supported by the contract. They're supported by the

1 evidence, and there's no basis to preclude us from making
2 it.

3 THE COURT: Thank you, Mr. Metlitsky.

4 Go ahead, Mr. Hinderaker. Here's what I'm going
5 to do, though: In an effort to keep us on the track that
6 I've hoped to be on, I'm going to dispense with argument on
7 Federal's counterclaim, unless that's what you stood up to
8 address.

9 I think you're standing up to say something in
10 response to Mr. Metlitsky.

11 MR. HINDERAKER: I am. I want to just try to
12 make some bullet points if you will.

13 THE COURT: Sure.

14 MR. HINDERAKER: To be that direct.

15 Just to point out, just to point out what their
16 argument depends on.

17 One thing it depends on is that it depends on a
18 deemed assignment, something considered to be an
19 assignment, to be a real assignment. If we were dealing
20 with a real assignment, we would be in the first sentence.
21 Deemed assignment is for a different purpose.

22 Then there's this sort of quick, quick shift
23 between Federal being acquired by Chubb Limited and then
24 ACE INA Holdings, Inc., to acknowledge the stipulated fact
25 that Federal became wholly-owned by ACE INA Holdings, Inc.

1 ACE INA Holdings, Inc., was the entity that was
2 created to be the merger entity. ACE Limited creates INA
3 Holdings, Inc., and the Chubb Corporation goes into ACE INA
4 Holdings, Inc. The facts are different than said.

5 I'm happy to look at the Carretta letter, and I'm
6 sure the court will. It's Plaintiff's Exhibit 90. On the
7 notice of breach letter, he addresses it to Chubb Limited.
8 He says I'd be happy to have a new license agreement with
9 you, Chubb Limited, going to the highest level of the
10 control.

11 I've read it a few thousand times. He talks
12 about the deemed assignment of the second sentence. That's
13 to suggest that -- to suggest that Mr. Carretta says, let's
14 make an assignment to you, Chubb Limited. That's not in
15 the letter.

16 Also, did you notice in the argument that the
17 definition of affiliates changes? Rather than the
18 definition in Amendment two, somebody downstream, that you
19 own more than 50 percent of. Now the argument depends upon
20 everybody being an affiliate, because they're all under the
21 same big tree of Chubb Limited. That's not the license
22 agreement.

23 And by the way. Federal still exists, it's still
24 a judicial or jural entity. And that have fact and that
25 proposition is purely one of law. It is for you to decide,

1 Your Honor. It doesn't matter that corporations that exist
2 and still exist are different from other corporations that
3 exist and still exist.

4 And doesn't matter that Federal Insurance Company
5 and ACE American are not affiliates, as that is defined by
6 the license agreement. It's a matter of looking at the
7 corporate tree that's in evidence, and the judgment is
8 right there.

9 So I find the argument that they have to be one
10 that requires shifting definitions and a passing reference
11 to who actually acquired who and who actually is owned by
12 whom.

13 Thank you.

14 THE COURT: All right. Thank you.

15 MR. METLITSKY: Can I just say one last thing?

16 THE COURT: Yes.

17 MR. METLITSKY: On the definition of "affiliate,"
18 it says, "Shall mean any other entity directly or
19 indirectly controlled," by the client so it doesn't have to
20 be a direct subsidiary.

21 THE COURT: Understood.

22 MR. HINDERAKER: And I do not disagree.
23 Indirectly or otherwise, Federal and ACE American are not
24 in that relationship.

25 MR. METLITSKY: That is true. Our argument is

1 not that ACE American is -- yes.

2 THE COURT: Your argument is that the client
3 changed.

4 MR. METLITSKY: Yes.

5 THE COURT: All right. We're going to take a
6 recess. I'll be back hopefully in here at quarter after
7 3:00, and I'll tell you what we are doing on these various
8 motions.

9 I would strongly suggest -- we're off the record.

10 (Recess taken)

11

12 **P R O C E E D I N G S**

13 **IN OPEN COURT** **3:21 p.m.**

14 THE COURT: All right. First turning to Docket
15 Number 1128 and the associated, that's Federal's motion,
16 but FICO's response also requested relief, but was not
17 docketed as a separate motion. So I'm referring to both by
18 the reference to 1128.

19 On the question of the breach or infringement by
20 use by foreign affiliates, this turns on the definition of
21 Chubb & Son, a division of Federal. The question is what
22 does that phrase mean. Does it mean Federal Insurance
23 Company, or does it literally mean Chubb & Son, a division
24 of Federal.

25 I find that as a matter of law, Chubb & Son, a

1 division of Federal, means Federal Insurance Company. An
2 unincorporated division is not a legal entity, and even
3 though it can sign contracts, it cannot be sued for the
4 contracts.

5 And when it does enter into contracts, it doesn't
6 do that independently of its corporation of which it's a
7 division.

8 I have read every one of the cases that have been
9 cited. I believe that this finding is required by New York
10 law. I think all of the cases say that. And so as a
11 matter of law, I'm finding that Chubb & Son, a division of
12 Federal Insurance, has to mean Federal Insurance Company.

13 And I will also note that were it to mean
14 otherwise, I think it would be, it would lead to an
15 impossible result. It would literally mean that the
16 license grant to Chubb & Son employees, or the restriction
17 that doesn't allow it to be used beyond employees, would
18 mean that no one could use it, given the testimony that's
19 been in the case. It would also render the definition of
20 affiliates in the original license agreement meaningless.

21 So as a result of that then, there can't be a
22 breach of the contract or an infringement through use of
23 the Blaze Advisor software by Chubb Canada, Chubb Europe or
24 Chubb Australia.

25 Turning to the question of use by third-party

1 consultants, Federal urges that that use is di minimis. It
2 was allowed; and therefore, FICO could not terminate the
3 contract because it was not a material breach.

4 The first question is whether a nonmaterial
5 breach is nonetheless actionable or can be the basis for a
6 verdict in FICO's favor, and the answer under New York law
7 clearly is that it can.

8 FICO urges that because the use is proven, it is
9 entitled to judgment as a matter of law that the contract
10 was breached. But there's been evidence from which a jury
11 could reasonably decide that the use was known, consented
12 to, harmless and not a breach.

13 So I am not finding as a matter of law that the
14 use by third-party consultants was a breach, and I am not
15 finding that it was not a breach. That is for the jury to
16 decide.

17 Federal nonetheless urges the court to hold that
18 the breach, if it was one, was not material as a matter of
19 law and therefore FICO could not have properly terminated
20 the license agreement on this basis. I find two flaws with
21 that argument.

22 Number one, though New York law says a breach
23 must be material in order to terminate a contract,
24 Section 9.2 (C) of the license agreement can reasonably be
25 read to mean that FICO could terminate the agreement even

1 if this particular kind of breach, which is to say a breach
2 of the license grant, which could then be interpreted to
3 include a breach of the restrictions on the license grant,
4 that that provision could be reasonably read to mean that
5 you can terminate the contract without a material breach.

6 Even if that weren't reasonable, based on the
7 evidence at trial, including the structure and content of
8 the license agreement and the testimony of several
9 witnesses, this jury could reasonably find that the breach,
10 despite the magnitude of the use, could still be material.

11 So Federal's motion is granted in part to the
12 extent with respect to the Chubb Canada, Chubb Europe,
13 Chubb Australia and then denied as to the rest of it.

14 FICO's counter motion is denied.

15 On disgorgement, I am going to deny the motion at
16 this stage based on the state of the evidence. And because
17 the verdict is advisory, I think the court will benefit
18 from the jury's advice on that finding, whatever it is.

19 However, at the end of this case, it is an
20 advisory finding, and I will exercise my own best
21 independent judgment on this question, even if it means
22 departing from the advisory verdict, whichever way it goes.

23 Docket 1135 then is denied.

24 Docket 1148, FICO's judgment for a matter --
25 judgment as a matter of law on infringement by ACE

1 American. I will also deny this motion. Federal's
2 position with respect to ACE American is not unfairly
3 prejudicial, nor do I find that it is a surprise.

4 It is not inconsistent, in my judgment, with
5 Federal's position as to the meaning of the phrase "client"
6 in the license agreement, and the testimony at trial would
7 permit a reasonable jury to find either way on the issue of
8 ACE American's alleged infringement.

9 And I do also rely on Judge Wright's analysis of
10 this issue, even though it was stated in terms of the
11 breach, rather than the infringement, at approximately
12 pages 45 to 50.

13 FICO's judgment, FICO's motion for a judgment as
14 a matter of law on Federal's counterclaim. I am going to
15 deny the motion for JMOL. Federal has put in evidence
16 during the trial that it sustained damage in the form of
17 costs and time to remove Blaze Advisor, as well as in the
18 form of loss of use of a license that it claims it had in
19 perpetuity, despite the merger.

20 However, Federal has not offered a calculation of
21 the value of the lost time of its employees or the cost of
22 removing Blaze Advisor from its software. And so it will
23 not offer a calculation in final argument.

24 There is considerable evidence in the record as
25 to the parties' allegations regarding the value of the use

1 of Blaze Advisor, and that evidence is also in the record
2 and could be used, if desired, regarding the counterclaim.

3 So that's the ruling on the motions as described.

4 On the request to take the counterclaim at the
5 end of the case, I'm going to deny that request. You will
6 have to address it in your summation initially.

7 MS. GODESKY: Thank you, Your Honor.

8 THE COURT: All right. Any questions regarding
9 these motions?

10 Mr. Hinderaker?

11 MR. HINDERAKER: No, Your Honor.

12 THE COURT: All right. Thank you.

13 Ms. Godesky, any questions?

14 MS. GODESKY: No, Your Honor.

15 THE COURT: Okay. Let's turn then to the jury
16 instructions and special verdict form. Will you all be
17 staying, or will some be departing? You're all welcome to
18 stay. I'm just --

19 You have a temperature update. What is it, that
20 it's hot?

21 THE CLERK: I do. That's not so much an update.

22 THE COURT: It's not an update.

23 THE CLERK: According to the U.S. GSA, the
24 outside air unit is down and is impacting the temperature
25 throughout the building. We are working on this and will

1 update you all as soon as we have further information.

2 Thank you for your patience.

3 THE COURT: Okay. That's right. The windows
4 don't open. All right. So it's going to remain hot.

5 So let's take up the jury instructions. You've
6 all been given a copy of them. And I'm just going to go
7 through them in order and ask you each if you have any --
8 if you contend that the instruction is contrary to law or
9 unfairly prejudicial.

10 So the first instruction, which is very general,
11 is only on the first page.

12 Mr. Hinderaker, any concern with that page?

13 MR. HINDERAKER: Are you speaking about the very
14 first page or --

15 THE COURT: The very first page.

16 MR. HINDERAKER: No. No. No problems, Your
17 Honor.

18 THE COURT: Okay. Ms. Godesky, Mr. Metlitsky?
19 Who's going to talk on your behalf, Mr. Metlitsky?

20 MR. METLITSKY: Yes, and no concern.

21 THE COURT: Okay. The next one is burden of
22 proof. Any concern, Mr. Hinderaker?

23 MR. HINDERAKER: No, Your Honor.

24 THE COURT: Mr. Metlitsky?

25 MR. METLITSKY: I don't object to it, but I would

1 offer a suggestion because I'm concerned that "proved by
2 the greater weight or preponderance of the evidence" sounds
3 like those are two different things. And so I would
4 suggest by the "greater weight of the evidence also called
5 the preponderance of the evidence" or some such
6 formulation.

7 THE COURT: Are you okay with that amendment,
8 Mr. Hinderaker?

9 MR. HINDERAKER: I am, Your Honor.

10 THE COURT: All right. Okay. That change will
11 be made.

12 I'm going to amend the way I'm doing this. I'm
13 going to read the title of the instruction, and if I hear
14 nothing, I will move on to the next one and understand that
15 nobody has an objection.

16 Credibility of witnesses.

17 Impeachment.

18 Expert opinion.

19 Deposition testimony.

20 Corporate representative testimony.

21 Limiting instruction regarding Exhibit P1116.

22 Other software license agreements.

23 Demonstrative summaries not received as evidence.

24 Now I know what's coming. Breach of contract.

25 Mr. Hinderaker.

1 MR. HINDERAKER: No concerns, Your Honor.

2 THE COURT: Okay. Mr. Metlitsky.

3 MR. METLITSKY: No concerns with the text, Your
4 Honor, but -- and I don't know if it would go here or
5 somewhere close to here, but we do think we're entitled to
6 a course of conduct -- or extrinsic evidence instruction,
7 because we notice that the, you know, it says that here are
8 the elements of breach, but it doesn't tell them how to --
9 what evidence they're allowed to look at to figure out what
10 the contract means.

11 I have, you know, a suggestion, but, you know,
12 there's -- these are sort of form instructions. But the
13 basic point is, you know, they should be able to look at
14 the language of the agreement, how a reasonable business
15 person would have understood the language, what the parties
16 actually intended.

17 And then they can look for that, you can consider
18 evidence of the parties' prior negotiations, circumstances
19 surrounding the formation of the license agreement, and you
20 may also look to how the parties conducted themselves after
21 the license agreement was executed. Something like that,
22 because otherwise there's no -- there's no guidance to them
23 about what they're allowed to look at.

24 THE COURT: It's a fair comment. Before I hear
25 from Mr. Hinderaker, let me just make a comment in

1 response, which is: What I don't want to do is, you know,
2 we're standing on the edge of a slippery slope, but that
3 one seems reasonable to me if generically phrased.

4 Mr. Hinderaker.

5 MR. HINDERAKER: I would like to see it to see
6 how specific it gets.

7 THE COURT: Sure.

8 MR. HINDERAKER: It strikes me that now -- that's
9 the sort of thing that one talks about in closing argument,
10 if there are facts that bear on those different elements.

11 THE COURT: Yeah. It will not -- I can guarantee
12 you it won't address any facts.

13 MR. HINDERAKER: No, I don't mean it would say
14 factually, but what I'm saying, in closing argument either
15 of us can talk about what goes into the considerations from
16 the record, consistent with the generality of the jury
17 instructions.

18 THE COURT: Say that again.

19 MR. HINDERAKER: The jury instruction advises the
20 jurors that it's their judgment to make these decisions.

21 THE COURT: Right.

22 MR. HINDERAKER: And closing argument, the
23 lawyers can say, well, from the evidence this bears on that
24 decision or something else bears on that decision. And I
25 think that's fine closing argument.

1 I don't think it needs to be, the instruction
2 doesn't have to have a series of bullet points to,
3 suggesting that something is not within the framework of
4 what can be said.

5 THE COURT: Yeah, and I -- let's do this. After
6 this conference, we'll draft an instruction for your, both
7 of your review. It will certainly be structured as, you
8 may consider this, this, this, this, and any other evidence
9 bearing on the meaning.

10 And we'll see what you think of that.

11 MR. METLITSKY: That would be fine. And just --
12 I'm sorry. Go ahead.

13 MR. HINDERAKER: I was just going to make a
14 housekeeping -- when we're done with this discussion, I
15 just wanted to make a housekeeping comment.

16 THE COURT: Okay.

17 MR. METLITSKY: I was just going to say that
18 there's already an instruction that says you can't look at
19 the --

20 THE COURT: Right. The settlement agreements.

21 MR. METLITSKY: It seems like we should tell them
22 what they can look at.

23 THE COURT: I agree -- I'm sorry. We should not
24 talk over each other.

25 I agree that it would be probably prudent.

1 Mr. Hinderaker, what's your housekeeping comment?

2 MR. HINDERAKER: I was just going to say that I
3 presume this is the case, but in terms of preserving FICO's
4 record with respect to the jury instructions, I don't
5 intend to repeat the court's decisions on all the arguments
6 that we have just made, so it's understood that if we had a
7 contrary temporary position then --

8 THE COURT: Absolutely.

9 MR. HINDERAKER: -- and conflict with the
10 instruction that our objection with respect to that is
11 preserved.

12 THE COURT: All of that is preserved, as well as
13 the court's rejection of previously proposed, but not
14 adopted instructions, should you decide to raise those
15 issues.

16 Okay. Breach of contract materiality. I think,
17 Mr. Metlitsky, you have a concern about this one.

18 MR. METLITSKY: Yes, Your Honor. So two grounds
19 for the -- well, first of all, let me tell you concern. I
20 think you know what it is.

21 But there's language, so just take the first
22 sentence, a breach -- sorry -- the third sentence,
23 performance by the non-breaching party is excused only if
24 the breach is material or if the contract provides
25 otherwise.

1 That, and there's language to that effect
2 throughout the charge.

3 So we think that is both contrary to the law of
4 the case and also incorrect as a matter of law. We're only
5 raising now the incorrectness as a matter of law because we
6 thought that everyone was bound by the law of the case.

7 So let me go through the law of the case first.
8 I'm sure Your Honor recalls when you said that if it
9 weren't blindingly obvious, you were going to follow
10 Judge Wright's decision. So I just want to take you
11 through the briefing. Okay?

12 In their summary judgment motion, they said they
13 want a judgment that they properly terminated the agreement
14 on the ground of the third-party consultants. Right?
15 Okay.

16 So we opposed. Here's what we said in our
17 opposition: "There is no breach and certainly no material
18 breach to justify rescission of the licensing agreement,"
19 and we cited *VFS Financial versus Falcon Fifty*, which
20 holds -- that's the New York breach standard: A breach is
21 material if it goes to the root of the agreement between
22 the parties, et cetera. Right?

23 And then we said, whether a breach is material is
24 a question of fact.

25 So they said in their response, "Any violation of

1 the license grant is material. Compare Section 9.2(c) with
2 Section 9.2(a)," So exactly the argument they are making
3 now. In response to our argument that that *VFS* case
4 provides the materiality standard, they said no 9.2(c)
5 overrides. Okay?

6 So here's what Judge Wright said: "FICO also
7 contends that Federal breached Section 3.1 by permitting
8 the consultants to use Blaze Advisor," et cetera et cetera.
9 "A breach of contract is material if it goes to the root of
10 the agreement between the parties and is so substantial
11 that it defeats the object of the parties from making the
12 contract, citing *VFS Financial Versus Falcon Fifty*, the
13 exact case that we cited.

14 "Whether the breach of contract is material is a
15 question of fact," citing the exact case we cited. And
16 then it said that, you know, it's going to be a jury
17 question.

18 So we were operating on the assumption, because
19 Your Honor said so, that we were, the parties were going to
20 be bound by Judge Wright's decision on that question. And
21 so a breach of Section 3.14 by these, you know, with these
22 third-party consultants was going to require proof of a
23 material breach to justify the termination.

24 And so we didn't put on a case about this. And,
25 you know, we had a conference on the record on Thursday

1 where the court suggested that the court agreed with us.
2 You said something to the effect of it says materiality in
3 the rule or anything.

4 The first, you know, we heard of this, the
5 possibility that the court wasn't going to follow
6 Judge Wright's decision, was yesterday whether we got this
7 proposed charge. And what are we supposed to do now? You
8 know, we didn't put on a case about how to construe
9 Section 9.2(c), because Judge Wright already construed it.

10 And so we think we're entitled to an instruction
11 that just says, the termination is allowed if the breach is
12 material under the New York materiality standard because
13 that is exactly what Judge Wright held.

14 THE COURT: Well, what page are you referring to
15 in Judge Wright's ruling, if you would?

16 MR. METLITSKY: So it's 44 to 45.

17 THE COURT: All right. Just hang on a second.

18 MR. METLITSKY: And -- and I think just as
19 important as her ruling is the briefing that sort of
20 resulted in her ruling.

21 THE COURT: Well, it's a little bit like the
22 briefing that you just argued regarding the infringement by
23 ACE. I'm not sure that -- I have to read it again, but I'm
24 not sure that the briefing precludes the argument that
25 9.2(c) doesn't require materiality.

1 But let me review this.

2 THE COURT: All right.

3 MR. METLITSKY: Your Honor, can I add one more
4 thing?

5 THE COURT: You may.

6 MR. METLITSKY: I think that opinion has to be
7 read in light of the briefing that preceded it, right? And
8 as I said, our response to their argument that they're
9 entitled to judgment that the termination was proper was
10 that rescission is, whether the rescission was proper is a
11 question for the jury, citing the *VFS Financial* case
12 providing the New York standard and then the next case for
13 the proposition that it's as a matter of law.

14 And their reply said any violation of the license
15 grant is material, and they cited Section 9.2(c). And
16 obviously Judge Wright rejected that. That's the whole
17 point of her opinion because if she had accepted it, she
18 would have granted them judgment; or at the very least, or
19 at the very least she would have said that there's an
20 ambiguity in the contract about what standard you had to
21 satisfy, but she said what standard you have to satisfy.

22 THE COURT: How is this -- but, you know, here's
23 where I think -- you're making an argument that sounds a
24 lot to my Ear like the argument Mr. Hinderaker made about
25 10.8 and the infringement by ACE American.

1 You moved for summary judgment on the grounds of,
2 can't be a material breach. They responded to that. And
3 Judge Wright said, material breach based on the facts and
4 the evidence and the argument of the cases is a matter of
5 fact for the jury.

6 They did not say that 9.2(c) required that the
7 breach be material.

8 MR. METLITSKY: No. They said 9.2(c) said that
9 any breach is material. That's what they said in their
10 brief. That's the literal -- any violation of the license
11 grant is material under 9.2(c).

12 And Judge Wright just squarely rejected that.
13 She said, a breach of contract is material, and then she
14 cited the New York standard.

15 THE COURT: She was -- I'm sorry. She was
16 rejecting their, the interpretation they were proffering at
17 summary judgment, but that's not -- well, you're not using
18 this phrase. Maybe you don't. Maybe this isn't necessary
19 to your argument, but that certainly isn't a binding
20 judicial admission on them.

21 MR. METLITSKY: No. No. No. I'm not
22 suggesting -- it's nothing about what they said. I'm just
23 saying that she rejected their argument because they said
24 any violation of the license grant is material. They could
25 have won that argument.

1 THE COURT: Right.

2 MR. METLITSKY: But they lost the argument
3 because she said, a material breach is material if it goes
4 to -- not any license breaches, like the basic opposite of
5 what they said, what they said. They said, any violation
6 of the license grant is material.

7 She said, a breach of contract is material if it
8 goes to the root of the agreement between the parties and
9 is so substantial that it defeats the object of the parties
10 in making the contract. That's just the regular New York
11 standard. And that's what we want charged.

12 THE COURT: Well, but she did not construe, and
13 she was not asked to construe Section 9.2(c) as to whether
14 it required a material breach.

15 MR. METLITSKY: But she was. That's what they
16 argued. Any violation of the license grant is material
17 under 9.2(c). And she said, a breach of contract is
18 material if it goes to the root of the agreement. I mean,
19 she just rejected their argument.

20 And so we were under the impression that that was
21 the law of the case. I can also explain to you why she was
22 totally right. I mean, we filed a letter on this. But
23 it's like crystal clear that she was right that the terms,
24 that when 9.2(c) refers to the terms of the license grant,
25 what it's referring to is Section 2.

1 And the reason you know that is because there's a
2 bunch of other very similar agreements in the record that
3 when they mean, when they don't have one of those immediate
4 termination provisions, they lump Section 2, License Grant,
5 and Section 3, Rights and restrictions together, because
6 you don't need to separate out License Grant.

7 And there are other groups of contracts in the
8 record that say rather than saying there is -- you can
9 immediately terminate based on a breach of the license
10 granted, it says you can immediately terminate based on a
11 breach of the license granted or license restrictions.

12 And in those cases they group license grant and
13 restrictions together. And that falls under, I forget the
14 name of the case, Your Honor, that we talked about long
15 ago, *Quadrant*, right, because it's exactly the same
16 language except one difference.

17 When they mean license grant and restrictions,
18 they say license grant and restrictions. When they mean
19 license grant, they say license grant. Here it says
20 license grant, and the contract splits out license grant is
21 Section 2. Restrictions is Section 3.

22 And One other point on this: Section 3.1, right
23 next to the, you know, third-party provision, includes an
24 anti-assignment provision. It's just duplicative of
25 Section 10.8.

1 So when you breach Section 10.8, that's got to be
2 material, but when you breach the same provision, almost
3 the same provision in Section 3.1, it doesn't? That
4 doesn't make any sense. So Judge Wright was exactly
5 correct when she held that the New York materiality
6 standard applies, because that's totally clear under the
7 agreement.

8 THE COURT: Okay. Would you agree with me that
9 as a statement of New York law, set aside law of the case,
10 set aside for a moment what you contend Judge Wright
11 decided, that this is an accurate statement of New York
12 law: Performance by the non-breaching party is excused
13 only if the breach is material or if the contract provides
14 otherwise?

15 MR. METLITSKY: You know, Your Honor, I don't
16 know -- so I've seen contract provisions that just say any
17 party can terminate them, like six months' notice or
18 something like that. And so in that sense, that is not a
19 provision dealing with termination on the basis of breach.

20 It's just, you know, termination or whatever
21 reason. I have not seen a case where the, where the
22 parties negotiated around the materiality provision, and
23 more important, I have never seen a case, and I -- there is
24 no way you will ever find a case where the parties
25 contracted around the materiality provision in an immediate

1 termination context in a licensing agreement, because the
2 consequence of that is if, you know, Federal sends the
3 third-party consultant Blaze Advisor and says, oh, man, two
4 seconds later says, oh, goodness, I didn't mean to send you
5 that, I call it back, they can terminate the provision.
6 They put you in breach of the copyright laws, and then they
7 exact, you know, 50 million, whatever license fee they're
8 going to try to exact from you because now you've just
9 become a copyright violator.

10 That's completely implausible. And then the
11 final point, this came up in the brief that they filed the
12 other day. They cited Mr. Waid's testimony that one of the
13 main reasons for this provision was to preserve
14 confidentiality.

15 And so if we're going to get down this road about
16 whether 9.2(c) applies or whatever, why doesn't the second
17 sentence apply, right, that material breaches of
18 confidentiality provision? So for like many, many reasons,
19 this is incorrect as a matter of law, and Judge Wright was
20 correct as a matter of law, that a material breach is
21 required.

22 THE COURT: Okay.

23 Mr. Hinderaker, I'll hear you on this. My
24 intention right now is to set this aside and keep moving,
25 and then we'll come back to it, but --

1 MR. HINDERAKER: Your Honor, we have briefed
2 this. We spent time today arguing it. You made a decision
3 on it, and now we're hearing the same argument again, can't
4 let it go.

5 If you wish to have further argument on this
6 issue, I'll defer to Ms. Stradley, who is more deep into
7 the cases, and I believe in her response addressed this
8 notion of what Judge Wright did and didn't do and what she
9 considered and didn't consider, but I think we've been down
10 this path, this road, already.

11 THE COURT: Ms. Stradley, you can stay at your
12 seat. Just turn the microphone on. Why don't you address
13 for me what you believe is the import of Judge Wright's
14 summary judgment ruling?

15 MS. STRADLEY: Sure. Well, as he said, what was
16 stated in the briefing at five -- Docket 558 at page 5 is
17 that the breach was not material. What we argued to
18 Judge Wright was that, I'm sorry. What we argued to
19 Judge Wright was that the breach was material and therefore
20 we had proven our case.

21 And what we're arguing here is something
22 completely different, which is that paragraph 9.2(c) does
23 not require materiality that the parties contracted around
24 materiality. And she was not faced with that question, and
25 you can see from her analysis, she didn't even address that

1 question.

2 She simply said that there's a fact issue as to
3 whether the breach is or is not material.

4 So I think he's reading too much into her
5 decision to infer that she had actually assessed this issue
6 when there's nothing to show that she had, when the issue
7 was not squarely before her in the briefing. The issue
8 squarely before her that was stated by FICO was that the
9 breach was material. And that's what she addressed.

10 MR. HINDERAKER: And could I add one comment as
11 the person who argued that issue?

12 THE COURT: Certainly.

13 MR. HINDERAKER: The argument was look at the,
14 look at 9.2(c) and see what rights that gives FICO when
15 there is or if there is a violation of the license grant.

16 And that difference there in that first sentence
17 relative to other parts of Section 9 itself demonstrated
18 the seriousness, the materiality, the consequently
19 importance to FICO when there is a violation of the license
20 grant.

21 We were using that contrast to point to the, just
22 as Mr. Waid testified as well, to the importance of
23 protecting the intellectual property. And then as
24 Ms. Stradley said, Judge Wright never gets into an analysis
25 of what the, of construing the first sentence. We weren't

1 making the argument of being able to terminate regardless
2 of materiality.

3 We were making the argument that because we can
4 terminate under those circumstances, it shows how important
5 the license restrictions and the license grant is to us.

6 So we are now at a different stage of the case.
7 And 9.2(c) has not been dealt with, except by Your Honor in
8 terms of the contracting round, as the phrase goes, how the
9 materiality and the application of 9.2(c) to the facts of
10 this case.

11 THE COURT: Go ahead, Mr. Metlitsky. Anything
12 further to add?

13 MR. METLITSKY: Five seconds. I just want to
14 point you to the cite in their brief. It's Docket Number
15 558 at page 5, and the sentence I'm talking about is the
16 first sentence of the last paragraph, where they say, "Any
17 violation of the license grant is material. See 9.2(c).
18 Compare that to 9.2(a)," and then they say that the
19 disclosure to the third parties is a breach, and thus it's
20 material.

21 MR. HINDERAKER: I think I made my case.

22 THE COURT: Okay. All right. Moving on, we'll
23 come back to that.

24 Termination.

25 MR. HINDERAKER: Before we go on, this isn't an

1 objection, Your Honor. This is just a question of whether
2 the phrasing is clear or not confusing.

3 THE COURT: In termination or the one we were
4 just in?

5 MR. HINDERAKER: In materiality.

6 THE COURT: Okay.

7 MR. HINDERAKER: So if we go to the last
8 paragraph, If you find that Federal breached the license
9 agreement, FICO was allowed to terminate the license
10 agreement, if that breach was material or, and I think
11 you'd like to add "or" if termination was expressly
12 permitted by the contract.

13 THE COURT: Yes. That -- if that instruction is
14 going in that direction, that language is necessary.

15 Okay. Termination, the next instruction.

16 Construction of the license agreement.

17 Actually, now, in light of the court's ruling, we
18 have two of those. One appears at page 15. The other is
19 at page 16.

20 It is my intention to use the one at page 16 but
21 because it incorporates what I've ruled as to the
22 definition of client. So your comments should be directed
23 to that instruction, recognizing, of course, that FICO
24 preserves its objection to that ruling and an instruction
25 based on it.

1 MR. HINDERAKER: So I have no quarrel -- I mean,
2 recognizing FICO's position, page 16 is fine.

3 THE COURT: Okay.

4 MR. METLITSKY: Your Honor, I think it should say
5 at the end that the -- this isn't the language I'm
6 proposing, but the consequence is there's no breach by the
7 use of the foreign affiliates, because I think the court's
8 ruling is not just that --

9 THE COURT: I've taken care of that in the
10 verdict form.

11 MR. METLITSKY: Oh, okay. Well, I think we
12 probably need some guidance on -- we can talk about what --

13 THE COURT: All right. I'm going to leave that
14 aside for the moment.

15 All right. Breach of implied covenant of good
16 faith and fair dealing.

17 MR. METLITSKY: We have an objection here because
18 it doesn't capture the full scope of our claim. We talked
19 about this at the conference the day before trial, I guess,
20 and Ms. Godesky explained the two bases for the claim. One
21 is the withholding consent. That's one for expanded use.

22 And the other one is, what she said was, FICO
23 argued that it had just discovered use of Blaze outside the
24 United States. We believe because the discovery in this
25 case has demonstrated that that was an allegation made in

1 bad faith because FICO had known for a decade before this
2 dispute, et cetera, et cetera. That was page 28 of that
3 transcript.

4 And then the court, more important, the court
5 said, I'm going to try to make it really clear what I
6 believe I said in the motions in limine on this topic.
7 Federal is free to argue that FICO breached the implied
8 covenant by improperly or outlandishly raising positions
9 that were in bad faith.

10 And when that gets to the issue of the
11 territorial restriction in the license, we have to be very
12 clear not to use the court's opinions. But clearly the
13 court allowed us to --

14 THE COURT: Yes, and you are -- it strikes me
15 that the better way to deal with this is not to try to
16 characterize your allegation.

17 MR. METLITSKY: Perfect. Just strike --

18 THE COURT: I am going to strike that.
19 Copyright infringement.

20 MR. HINDERAKER: So, then, Your Honor, just as a
21 point on the record, we have on file, I guess, but we've
22 raised objections to this new theory of the case, after
23 interrogatory answers had a different theory and after the
24 pleadings had a different theory.

25 So until this trial started, the only basis for

1 the so-called bad faith claim, the only basis for the
2 implied covenant of good faith and fair dealing was the one
3 that's described here in the instructions.

4 This notion of an implied covenant of breach
5 because of the territorial language, that entered the case
6 in February of this year, and I don't think the court has
7 said clearly one way or the other, but we have objected to
8 new theory of the case with interrogatories never
9 supplemented, and so that's our record.

10 MR. METLITSKY: I can respond if -- okay.

11 THE COURT: Please do.

12 MR. METLITSKY: So first of all, I mean I just
13 read how the court expressly allowed us to do this.

14 THE COURT: I did.

15 MR. METLITSKY: Yeah. We had this fight already
16 at the motion in limine stage and at this conference. And
17 I take it from what the court said that the court rejected
18 their argument.

19 But if we're fighting this again, the question is
20 whether there's prejudice, right? You can, you know,
21 conform to the proof even at trial under Rule 15(b) if
22 there's no prejudice, and the idea that there's prejudice
23 here frankly is, well, they, until today they have
24 maintained in this case that their global affiliates
25 could -- were not allowed to use the license.

1 So all of the evidence, literally every single
2 piece of evidence that is relevant to this aspect of our
3 counterclaim, was invited by them when they were arguing
4 that there was no global scope to this license.

5 They even, they played deposition testimony in
6 their own case about this. The idea that there's prejudice
7 to them that we would take all of that exact same evidence
8 that they insisted was relevant to this trial and just, you
9 know, argue it back in a counterclaim, seems to me to be
10 incorrect.

11 And so, you know, the fact that combined with the
12 fact that the court expressly already held the day before
13 trial that we were allowed to make this claim, two of those
14 things in combination, seems to me that, you know, deleting
15 that language is fine with us.

16 But as for the rest of it we're allowed to press
17 that claim, as the court held.

18 THE COURT: I understand. And I did make that
19 ruling. And I do recall making that ruling.

20 I want to emphasize something that I said at the
21 time, which of course is, you will not drag the court into
22 that argument.

23 MR. METLITSKY: That was very well-understood
24 from the language I just read, Your Honor.

25 MR. HINDERAKER: Your Honor, with respect to this

1 then?

2 THE COURT: Yes.

3 MR. HINDERAKER: Because the evidence is some
4 salesmen were aware of -- the evidence is that people on
5 the sales side, Mike Sawyer, Russell Schreiber, had some
6 knowledge of use outside the United States, and their
7 understanding of the license agreement as we've heard
8 changed over time.

9 But my point is that if this is going to be in
10 the case on the instructions, then I think we should
11 address instructions that are directed to authority of
12 agents, instructions that are directed to the license
13 agreement with respect to the entirety of the agreement, no
14 amendments without writing; and instructions with respect
15 to the license agreement that says, no express waiver
16 without a writing.

17 So if the, if we're going to be impacted by the
18 knowledge of salespeople out in the sales force in contrast
19 with the knowledge of the executives, then an instruction
20 regarding whether the salespeople have authority to bind
21 FICO would be appropriate.

22 MR. METLITSKY: Your Honor, definitely would
23 object to that. First of all, these are high level people.
24 They were the client partners. All that evidence came in,
25 but what -- even setting that aside, the question of

1 whether who can bind FICO is totally irrelevant here.

2 We're not saying that there was a new contract
3 formed or anything like that. We're just saying it was a
4 bad faith claim. And the jury, if they want to say that,
5 you know, these people -- they could say whatever they
6 want, right, and I'm sure -- they would have said all the
7 same things under their 3.1 claim, whatever they're going
8 to say in defense to our bad faith argument.

9 But the scope of authority is about who can bind.
10 And that's not what this claim is about. It's about bad
11 faith.

12 THE COURT: Here's -- well, I'm not going to do
13 the instructions that you suggested, Mr. Hinderaker, but my
14 understanding of this claim, even in light of what I said,
15 was that the bad faith that is alleged occurred in 2016,
16 when Mr. Carretta and others took the position that you say
17 is unfounded.

18 Well, and the court has found that it's not in
19 the contract, but that is the bad faith, that they relied
20 on a territorial restriction that isn't in the contract.

21 And, of course, quite obviously, FICO can respond
22 to that by pointing to the terms of the license and to the
23 testimony in which they have explained why it wasn't in bad
24 faith. Okay? All right.

25 Copyright infringement.

1 Proof of damages.

2 MR. METLITSKY: Your Honor, my only comment on
3 this was that we should do a nominal damages charge.

4 THE COURT: And that is in here. It's coming.

5 MR. METLITSKY: Okay.

6 THE COURT: So the next one is breach of
7 contract, implied covenant damages. And then after that,
8 it's nominal damages because nominal damages only apply to
9 those claims.

10 MR. METLITSKY: Okay.

11 THE COURT: And you've received the nominal
12 damages instruction, correct?

13 MR. METLITSKY: Yes.

14 THE COURT: All right. Next one, infringement
15 damages.

16 MR. METLITSKY: Your Honor?

17 THE COURT: Yep.

18 MR. METLITSKY: Two little points, but I think
19 they're important. First of all, licensor in the middle
20 here is capitalized.

21 THE COURT: Yeah.

22 MR. METLITSKY: Yeah. And it also says the
23 licensor and the licensee, and we think it should --

24 THE COURT: Oh, you are on a different --

25 MR. METLITSKY: I'm sorry. Where are we?

1 THE COURT: I'm on page 21, infringement damages.

2 MR. METLITSKY: Oh, I was going to the next one.

3 Sorry.

4 THE COURT: Determination of actual damages.

5 And is that where we have the issue?

6 MR. METLITSKY: Yeah. So like right in the
7 middle of the second paragraph, there's a capital L.

8 THE COURT: That's coming out.

9 MR. METLITSKY: Yeah. And at the beginning of
10 that paragraph, we think it should say a licensor and a
11 licensee because it's hypothetical.

12 THE COURT: I've been thinking about that since
13 you raised it yesterday, and I'm going to not make that
14 change for two reasons:

15 Number one, I think this is an accurate statement
16 of the law, and I think it is fair for this jury to
17 consider FICO and Federal; but even with that, the phrase
18 "the licensor and the licensee" can certainly be read by a
19 jury in a generic sense.

20 So I'm not going to make that change, but I am
21 taking out the capital.

22 Mr. Hinderaker, any other?

23 MR. HINDERAKER: No, Your Honor.

24 MS. GODESKY: Your Honor, may I raise an issue
25 with regard to actual damages?

1 THE COURT: You may.

2 MS. GODESKY: So in light of the court's ruling
3 on that there can be no breach of 3.1, vis-à-vis the
4 foreign affiliates.

5 THE COURT: Right.

6 MS. GODESKY: We would request an instruction
7 that the jury, an explanation and instruction that the jury
8 was presented with certain license fee calculations by
9 Mr. Waid, including use in Canada, Australia and Europe,
10 right, his \$50 million number that was constructed around
11 Chubb's actual use, right, and then Mr. Hinderaker walked
12 him through how you would apply that to the, quote unquote,
13 "standard pricing guide at FICO."

14 But I think we need, you know, some guardrails
15 along with your instruction about how that's no longer in
16 the case. I think we need to be telling them, you know,
17 I'm just sort of thinking about it now, right, but there
18 needs to be some sort of instruction and explanation as to
19 how more than half of the damages that they've been
20 presenting are out of the case, in terms of that
21 hypothetical license fee.

22 THE COURT: I have to confess that I don't
23 remember the numbers specifically with respect to that
24 issue. I thought you were going to the, I think the
25 Zoltowski issue of 154 million, which is --

1 MS. GODESKY: That too.

2 THE COURT: -- also in the case.

3 MS. GODESKY: Yes, that too. But the \$50 million
4 hypothetical license fee was built around the assumption
5 that it would be possible, you know, that there's a need to
6 find a license fee that would cover infringing use by
7 Canada, Australia and Europe.

8 So I just, I think we need to level set with the
9 jury in terms of what's changed.

10 MR. HINDERAKER: A comment: We were very
11 careful, and the court was quite instructive and direct, in
12 the fact that after applications were sized, if you will,
13 that pricing matrix against the defendants' data, the next
14 slides and all of the next slides on the named application
15 license never identify an application.

16 The testimony was, if you have a certain mix, and
17 here we have some very large, some large, this is how the
18 pricing works out. It was never identified to be an
19 application in the U.S. or anywhere and never identified to
20 be an application. So there isn't that issue.

21 Secondly, when the testimony turned to, well, how
22 would you price it with a perpetual, again, there was never
23 a reference to -- we had a hypothetical \$35 billion company
24 and we had a hypothetical \$3.5 billion company. It was
25 never identified where does 3.5 come from.

1 We just, the jury just heard, well, let's see how
2 it works out if you have a tenth of the size of the
3 company, and that's the information that they got.

4 THE COURT: And the infringing use at the point
5 of the hypothetical negotiation is not based on whether the
6 affiliates could use it while the license was in play. So
7 I don't think I should do that instruction. There just --

8 They're hypothetically negotiating over the use
9 that was made, which includes Canada and the UK, maybe not
10 much of Australia. But, in other words, it's still
11 appropriate to consider that use because the infringement
12 isn't based on the territory restriction.

13 You are not following me.

14 MS. GODESKY: No. I'm following you on the
15 infringement piece.

16 THE COURT: Okay.

17 MS. GODESKY: But I still think there's a big
18 problem on the actual damages piece, because, you know,
19 whether the slides were labeled Chubb's use of Blaze or
20 not, Mr. Waid walked through, Chubb had a very large
21 application in Australia. I'm making up the country,
22 right, but it was very large in Australia, and it was used
23 for four years. And then the chart he put up right after
24 that was very large, four years, price, and all of it
25 totaled up to \$50 million.

1 So, you know, if the jury is tracking what was
2 being presented, they're thinking that there's a
3 \$50 million license fee covering the use that was discussed
4 during Mr. Waid's direct examination.

5 THE COURT: Prior to 2016.

6 MS. GODESKY: Correct.

7 MR. HINDERAKER: Well, \$50 million isn't all
8 prior to 2016, but the -- the jury is going to be
9 instructed -- the jury is going to hear the court's
10 instructions. The argument is going to conform with the
11 court's instructions and the court's rulings.

12 And from the termination of the license
13 agreement, we will be looking at those applications, and we
14 will be going through the sizing and pricing and the
15 testimony that relates only to those applications.

16 Some of those applications will be the Canadian
17 application and will be the UK application for license fee
18 because those uses carried on after the license agreement
19 was terminated.

20 So today the client is Federal. Today they're
21 affiliates of Federal, and they were clients and affiliates
22 but not after March 31, 2016. So those application names
23 are going to be in the case as well. I think the jury's
24 just going to hear our closing argument in light of your
25 instructions.

1 And will the numbers be different overall? Sure.
2 But they're going to hear what we're asking for.

3 THE COURT: As I'm hearing all this, it strikes
4 me that Mr. Metlitsky's suggestion back on construction of
5 the license agreement with adding a sentence that says that
6 I found that -- this isn't the exact language I'll use, and
7 you get to see the language.

8 But prior to 2016, the license -- it was not a
9 violation of the license agreement to use the software by
10 Chubb Canada, Chubb Australia, Chubb UK. And I think that
11 will give you what you need in final argument to discuss
12 what you need about the numbers for the actual damages.

13 I understand your concern.

14 MS. GODESKY: May I reference that expressly?
15 You know, the judge just instructed you that --

16 THE COURT: Yes.

17 MS. GODESKY: -- however it is that you phrase
18 it.

19 THE COURT: Yes.

20 MS. GODESKY: And then address it that way?

21 THE COURT: Yes.

22 MS. GODESKY: My second -- I would propose, just
23 so we're all on the same page, that at a certain time
24 tonight soon, to the extent there's going to be a
25 demonstrative that would summarize --

1 You know, Mr. Waid put up his demonstrative that
2 they got to 50 million. I would expect they would have
3 probably used that in closing.

4 I think I have to close first. I'm sort of
5 flying blind, you know. Mr. Hinderaker is saying it's
6 going to conform to the court's ruling, but I think it
7 would be in everyone's interest for us all to just make
8 sure we don't have any dispute about that before openings
9 start in terms of, if you take the \$50 million number and
10 extract the pre-2016 use, right, what's the number and how
11 are they going to say they get there?

12 THE COURT: I think that's fair, but --

13 MR. HINDERAKER: I hope that both sides exchange
14 their --

15 THE COURT: Right.

16 MR. HINDERAKER: -- their demonstrative slides.
17 I hope both sides exchange their demonstrative slides
18 timely after they're prepared.

19 THE COURT: They will.

20 MR. HINDERAKER: But I can't exchange what I
21 don't have.

22 THE COURT: No, I understand.

23 So if you both need me to set a time, I will, but
24 it seems to me that you guys are better off just agreeing
25 on a time at which you will exchange those tonight at a

1 reasonable hour, recognizing lawyers' definition of
2 "reasonable" in this context.

3 MS. GODESKY: So we did not have an agreement to
4 exchange demonstratives for closing. I mean, is it the
5 court's order that we need to do that in terms of, you
6 know, I mean, most of this is in evidence.

7 THE COURT: Right. Well, you're going to have to
8 exchange it before you give the closing, obviously, yes.
9 You know, let me put it this way:

10 Well, nobody wants a situation where somehow a
11 demonstrative is used during closing that is wildly
12 inappropriate or would constitute some grounds for arguing
13 error or objecting even.

14 I take your point. I guess the parties probably
15 don't want to exchange them before closing; and if that's
16 the case, then I would say -- I take Mr. Hinderaker at his
17 representation, but let's do this:

18 If you're going to use a slide about that actual
19 damages negotiation, why don't you at least submit it to me
20 for in camera review this evening. And, Ms. Godesky, if I
21 have no concern with it, we'll have to go.

22 MS. GODESKY: That's fine with me, Your Honor,
23 but I would ask that we should know what the number is.
24 You know --

25 THE COURT: What is the number? I mean, is

1 this --

2 MS. GODESKY: I think it takes out more than
3 half, but, you know --

4 THE COURT: That should be a matter of testimony.
5 Isn't it already in the record?

6 MR. HINDERAKER: Sure. She has the information
7 from the slides from -- and our demonstratives with
8 Mr. Waid. It's a matter of just doing the math.

9 THE COURT: Okay.

10 MS. GODESKY: Okay.

11 THE COURT: Okay.

12 MR. HINDERAKER: I mean, we know the
13 applications. We know the new time period.

14 THE COURT: Well share the number with each other
15 in case you don't agree. Okay?

16 MR. HINDERAKER: Once we figure out -- yeah, but
17 it's math for us too. Just have to do the math. So I'm
18 happy -- let me back up for a moment.

19 I'm happy to share the number once we have it.
20 And then if we're not going to exchange closing slides, I
21 get that point as well. But then maybe there's no reason
22 for us to send you a slide.

23 THE COURT: There is none. I agree with you.
24 Share the number. Make sure you are on the same page. If
25 you are not on the same page, I expect I will hear

1 something.

2 MR. HINDERAKER: You will hear.

3 MS. GODESKY: Thank you.

4 THE COURT: Other than -- okay. So I think we're
5 done on determination of actual damages, having rejected
6 Mr. Metlitsky's request.

7 Profits -- and by the way, thank you parties
8 for -- I don't know what lodged in my brain that I called
9 this throughout lost profits, but thanks for pointing that
10 out.

11 Profits.

12 Page 24, Profits: Indirect profits.

13 MR. HINDERAKER: Is that a necessary instruction?
14 It is, of course, an indirect profits case, but I don't see
15 how it matters to the jury.

16 THE COURT: Yeah, I've been thinking about that.
17 I don't know that it is a necessary instruction.

18 MR. METLITSKY: Leave it up to you, Your Honor.

19 THE COURT: So we'll take it out.

20 Profits: Plaintiff's burden.

21 MR. HINDERAKER: We have some comments.

22 THE COURT: Okay.

23 MR. HINDERAKER: The first comment is the use of
24 the word "causal." We have no quarrel with the use of the
25 word "nexus." You know, we referenced Judge Wright's

1 decision, of course, and on page 7, I think it's 7, it is
2 page 7. "In doing so the copyright owner has the initial
3 burden to demonstrate a nexus between the infringement and
4 the infringer's profits."

5 The word "causal" isn't there.

6 THE COURT: It's not in her order; I would agree
7 with that.

8 MR. HINDERAKER: And it starts to sneak up on
9 these arguments of "but for." And I think nexus serves the
10 same purpose as causal without the mischief of suggesting
11 that it's more than a nexus.

12 THE COURT: My recollection is that *Andreas* ^
13 used that word. One of the cases cited here did. I
14 thought it was *Andreas*.

15 Yeah, it was *Andreas*.

16 MR. HINDERAKER: I know that she's cites *Andreas*
17 as support for the sentence that I just read. I don't have
18 the case in front of me to know one way or the other.

19 THE COURT: All right.

20 MR. HINDERAKER: The next sentence, of course, is
21 after that nexus is established, then the burden shifts.

22 THE COURT: Okay. Let me do this -- well, let me
23 first hear from Mr. Metlitsky on this particular.

24 MR. HINDERAKER: Okay. I have some more comments
25 on this instruction.

1 THE COURT: Yep.

2 MR. METLITSKY: Your Honor, so we would object to
3 taking out "causal." We think that's the standard. It's a
4 causation standard.

5 And, you know, we don't see any reason to take it
6 out. The fact that it wasn't in Judge Wright's opinion,
7 she wasn't writing a jury instruction. So --

8 THE COURT: Well, and let's be clear about
9 something. I -- it's not a "but for" standard. And
10 nobody's going to be arguing that it is. Right? Okay.

11 MR. METLITSKY: Nobody's going to be arguing that
12 it is, but the word "causal" is in *Andreas* many, many times
13 so we would --

14 THE COURT: All right. Mr. Hinderaker, keep
15 going.

16 MR. HINDERAKER: I'm just looking at *Andreas*.

17 *Andreas* argues that he met his burden by
18 establishing a causal connection. We don't have to read
19 the full case here, but I think a quick reference to
20 *Andreas* conforms with Judge Wright's expression of what
21 *Andreas* stands for, and nexus is not a component.

22 My second point is, and the court made this
23 change some places, that is to add the phrase "at least in
24 part," which conforms with *Andreas*, conforms with the
25 *Honeywell* case and conforms with Judge Wright.

1 So here it would be the third line, this is
2 referred to as attribution. FICO must identify defendants'
3 revenues that are attributable at least in part to the
4 alleged infringement.

5 Now, the court uses that phrasing in the special
6 verdict at question nine. I don't think it's arguable that
7 that is the legal standard. And so we would ask that that
8 phrase be added to plaintiff's burden.

9 THE COURT: As long as you're speaking,
10 Mr. Hinderaker, other comments on this before I turn back
11 to Mr. Metlitsky?

12 MR. HINDERAKER: No, not on this instruction.
13 Oh, I guess there is one more.

14 MS. KLIEBENSTEIN: You got it.

15 MR. HINDERAKER: Oh, yeah. So I was just
16 pointing out where that same phrase should be added. Where
17 you sum up at the end of the paragraph, that is, FICO must
18 show that the use of Blaze Advisor contributed, and it
19 should be again at least in part to the generation of the
20 revenue, just to be --

21 THE COURT: Consistent.

22 MR. HINDERAKER: -- consistent.

23 MR. METLITSKY: Your Honor, we object. We object
24 to that.

25 THE COURT: I know you do.

1 MR. METLITSKY: Yeah.

2 THE COURT: All right. I'll put that one aside
3 for the moment.

4 MR. METLITSKY: Can I explain my objection?

5 THE COURT: Yes, by all means.

6 MR. METLITSKY: So on the first one,
7 "attributable to" that's just language from the statute.
8 You should not be adding language to, you know, statutory
9 language.

10 And I don't think it's correct. I mean,
11 "contributed to at least in part" is wrong. "Contributed
12 to" already means at least in part. That's, it's already
13 implied in the phrase.

14 "Contributed to at least in part" is nowhere in
15 *Andreas*. And the problem with "at least in part" is, it
16 leads into the issue that we were discussing earlier where
17 you are a small part of a big application, and they're
18 going to think that that means that just because the big
19 application contributes to revenue, this then contributes
20 in part.

21 That language is not in the governing case in the
22 Eighth Circuit. And so I do not think we should add it
23 because it's going to cause mischief.

24 THE COURT: Well, and I understand your point. I
25 am inclined to agree. And, frankly, because of this

1 causation standard, this nexus standard, I'm inclined to
2 say if I were going to add that phrase, there is a phrase
3 that I would be inclined to then add from -- it's either
4 *IBM* or *Complex Systems*.

5 And I don't think we want to start walking down
6 that path. Let me think about this one. I understand the
7 concerns on both sides.

8 MR. HINDERAKER: And my last comment on it, of
9 course, there is that to the extent that defendants have
10 raised a concern with respect to what it means, I view the
11 concern as a similar effort to shift the burden.

12 The extent to which all other things, except the
13 infringement, contributes to the revenue, is their
14 obligation to show.

15 THE COURT: Right. And I think, you know, if
16 that phrase is out, I certainly think that you can argue in
17 final argument that you, the jury, knows what contribution
18 means. It's means it's got to contribute in part.

19 MR. HINDERAKER: It would be much better to not
20 have to -- I can --

21 THE COURT: I know.

22 MR. HINDERAKER: It's a nice argument that he
23 made, but I can read and understand contribution to be
24 quite different. That's why the case law says contribution
25 at least in part, to eliminate that ambiguity.

1 THE COURT: Is -- what case law uses that phrase,
2 if you know?

3 MR. HINDERAKER: Well, we don't rely on the *Polar*
4 *Bear* case for, *Polar Bear Products* case for other reasons,
5 but that case has the phrase "at least partially caused."
6 And I can't --

7 THE COURT: All right.

8 MR. HINDERAKER: -- at the moment go otherwise,
9 help you with more than that.

10 THE COURT: Okay. Well, I'll give that some
11 further thought.

12 Profits: Defendants' burden.

13 All right. View of damages. I'm sure we have no
14 problem with that, right?

15 Okay. And then after all those are given and
16 after final argument, then the last instruction is the
17 election of foreperson. And I assume there's no objection
18 to that.

19 Let's turn to the latest version of the verdict
20 form.

21 Mr. Hinderaker, why don't you begin? Let's just
22 start with part one.

23 MR. HINDERAKER: All right. We discussed this
24 yesterday in the informal conference. And I think I was
25 told that I wasn't saying it very well, but --

1 THE COURT: I can just tell you. I don't know
2 what the issue is.

3 MR. HINDERAKER: Then I can't screw up yet.

4 Judge Wright at page 49 of her decision addresses
5 this circumstance where FICO is arguing its interpretation
6 of the, "and client shall make no expanded use." And then
7 the defendant is arguing its interpretation of you don't, I
8 don't need your consent if I don't expand use.

9 And she says the parties vigorously dispute the
10 meaning and significance of this evidence. And then she
11 goes on to say, "Moreover, if Federal's interpretation were
12 accepted, material fact disputes exist as to whether
13 Federal expanded its use of Blaze Advisor after the Chubb
14 Corporation merger."

15 So our theory of the case is that the consent
16 requirement applied, as the verdict form is drafted, before
17 termination. But the defendants' theory of the case is
18 that the consent requirement doesn't apply until they
19 expand use.

20 And we've developed the case of the expanded
21 usee.

22 THE COURT: Both before and after, or what?

23 MR. HINDERAKER: Well, before, you know, we're
24 talking about within days of the merger.

25 THE COURT: Right.

1 MR. HINDERAKER: Before, we're talking about the
2 intention to expand use. We're talking about the planning
3 to expand use. We're talking about how the reasons for
4 having 10.8 are in play.

5 And then under Judge Wright's interpretation, if
6 the defendants' theory holds, well, then the question
7 becomes as a matter of fact did they not expand use? And
8 we have evidence that as a matter of fact they did,
9 because, you know, the data, it shows, you know, what is
10 it, \$360 million of additional volumes just in the first
11 year.

12 So we think that there should be a number three,
13 you know, which is: Did FICO prove that Federal breached
14 paragraph 10.8 of the license agreement after March or just
15 say, did FICO prove that Federal breached Section 10.8 of
16 the license agreement and not tie it to a date.

17 But that's where the concern comes from. We feel
18 like we're going to get caught in a catch-22. And if we
19 can show that the defendants' representation of no expanded
20 use is in fact a false one, we don't want to be denied our
21 remedies because we got schnuckered.

22 THE COURT: Hang on one second.

23 Judge Wright says at page 50, "FICO's argument
24 that the continued use of Blaze Advisor is a breach of
25 Section 9.3. FICO's argument is contingent upon a finding

1 that Federal breached Section 3.1 or Section 10.8 prior to
2 March 30, 2016."

3 MR. HINDERAKER: That is FICO's theory of the
4 case, yes.

5 THE COURT: I don't think Federal is taking the
6 position that, well, we didn't expand before 20 --
7 March 30th, 2016, but we sure as hell did afterwards.

8 MR. HINDERAKER: Well, Federal's position is, we
9 never expanded; therefore, we never needed your consent.

10 THE COURT: Right.

11 So you would want a third question or a
12 reformulation of question two to say, Did FICO prove that
13 Federal breached Section 10.8, period.

14 MR. HINDERAKER: Yes.

15 THE COURT: Mr. Metlitsky.

16 MR. METLITSKY: I don't think we can do that,
17 Your Honor, because it gets very complicated if you, if you
18 depart from this, because there's implications for the
19 copyright claim. It also is not true that -- so let's take
20 the scenario that I think Mr. Hinderaker --

21 THE COURT: Just explain the first clause of your
22 sentence.

23 MR. METLITSKY: The copyright claim?

24 THE COURT: Yeah.

25 MR. METLITSKY: So let me just sort of set the

1 stage.

2 So the way this would work is, the termination
3 was improper, right, because we didn't need consent. And
4 then let's say, I don't know what it is, a year later, just
5 hypothetically, there's expanded use.

6 First of all, it's not a breach of the agreement
7 to expand use. It's a breach of the agreement to expand
8 use without consent, and they can't unreasonably withhold
9 it. So what they would have to show is not just that there
10 was expanded use, but obviously we couldn't ask for consent
11 because the license was already terminated.

12 So I think you would have had to assume consent
13 was requested, and then wouldn't have been reasonable to
14 deny the consent? I think that's what they would have to
15 show, I think, because that's what the contract requires.

16 But then let's say they did show that, right, the
17 way this works now, because it's teed off the termination
18 is, if the termination was proper, the use of the software
19 after the moment of the termination, was a copyright
20 infringement in total.

21 But if, if there's no termination, right, which
22 is by hypothesis what's happening then -- and they proved
23 expanded use, right, so like if you have an agreement to
24 use ten things and you use eleven things, only the eleventh
25 thing is a breach of the copyright agreement if the license

1 wasn't terminated.

2 So it would only -- exactly. So the copyright
3 infringement would only be to the extent of the expanded
4 use for which it was unreasonable to withhold consent. So
5 I don't think -- I don't know if there's any -- I don't
6 know where a jury could --

7 THE COURT: Here's -- yeah, I understand.

8 Here's what I understand was the case that we
9 tried. Maybe I'm wrong. Federal says -- well, no, let's
10 start with the plaintiff.

11 FICO says, you merged and therefore received the
12 right or got the right to process the claims of the larger
13 entity and in fact did, and that is expanded use, and
14 therefore, we terminated under Section -- well, because of
15 your breach of 10.8.

16 Federal says, no, it's not expanded use. We had
17 the same software running and the same applications doing
18 the same thing, and the only thing that ever happened over
19 time may be that our -- trying to think of the way I want
20 to phrase this -- but our revenue expanded.

21 And then you have the debate about, well, but, is
22 it organic or not organic, but that's I think the case we
23 tried. Right?

24 And so FICO's -- what you're saying, though, is
25 you can't be snuckered by them saying, we locked it down.

1 Nothing changed. FICO terminated the contract. We didn't
2 think it was effective, and therefore we started expanding
3 use at that time, neener, neener, right?

4 All right. What do you say to that?

5 MR. METLITSKY: Well, the first thing I would say
6 is, it's not, expanded use doesn't violate the contract.
7 It is expanded use for which it would be unreasonable to
8 give consent.

9 MR. HINDERAKER: Don't you have to ask first?

10 MR. METLITSKY: Well, we couldn't ask because you
11 terminated our license. By hypothesis, the termination was
12 invalid. So their claim -- expanded use by itself doesn't
13 terminate -- doesn't breach the contract on our theory.
14 If --

15 Our theory would be that there was, there was a
16 merger. We didn't have to seek consent, but if we expanded
17 use, then we would have to seek consent, right? That's
18 just our theory.

19 They're saying that now by hypothesis, we're
20 right about our theory, but they terminated the license
21 anyway because we didn't seek consent. So now who, who are
22 we supposed to ask?

23 So I don't -- so it can't just be that expanded
24 use breaches the contract because that is not the only
25 predicate in the contract for breach based on expanded use.

1 And then, as I said, I don't, I mean maybe they
2 want to -- I don't know if they want to argue copyright
3 infringement in this breach scenario. So maybe -- I don't
4 know. Because if they do, as I said, it would be a
5 completely different type of copyright case.

6 It would be an argument that you've expanded
7 beyond the scope of your license, but since the termination
8 would have been improper, they couldn't get all of the
9 disgorgement of all of the revenue. They couldn't get
10 actual damages as to all the revenue.

11 It would only be the expanded use. And there's,
12 what's the evidence of that, you know?

13 MR. HINDERAKER: What I had proposed once a time
14 earlier was to have, was another proposal that we made once
15 upon a time was to have a third question so that you could
16 have the question prove breach before March 30th, 2016,
17 have that clarity of date, or, and then have a second
18 question prove breach without the date limitation. That's
19 one way of --

20 THE COURT: And would that question three, your
21 proposed question three, go after or before the instruction
22 at the bottom of the first page?

23 MR. HINDERAKER: It would go -- after or
24 before -- I mean, it would go after three?

25 THE COURT: Would it go after -- I've got at the

1 bottom of the first page, instruction if you find in favor
2 of Federal on both one and two, skip the remainder.

3 MR. HINDERAKER: Yeah, so if Federal wins all
4 ways, yeah. I mean, if Federal wins, if FICO fails to
5 prove breach before March 30, 2016, if FICO fails to prove
6 breach at any time, if FICO fails to prove breach of 3.1, I
7 mean, if FICO fails to prove its claim, Federal, Federal is
8 on all questions, yeah, then you have to skip to ACE
9 American.

10 THE COURT: The -- well, I think, I think that --
11 all right. This is -- I don't know the way around this.
12 I'm going to raise a complication that hasn't been raised
13 yet, because it fits in sort of here.

14 Third-party use. If that is a breach of the
15 licensing agreement, it is copyright infringement, right?

16 MR. HINDERAKER: Well, if the proof, if the
17 breach of the third-party use of 3.1 is proven, and it is
18 the basis of the termination, then the copyright
19 infringement -- that triggers the copyright infringement
20 against the claims of the defendants.

21 So AppCentrica, on using Blaze Advisor in an
22 unauthorized way, would be copyright infringement of
23 AppCentrica, but that's not what we're trying.

24 THE COURT: I know.

25 MR. HINDERAKER: Yeah.

1 THE COURT: It's certainly not what you've been
2 after.

3 MR. HINDERAKER: Yeah.

4 THE COURT: I think the whole -- so it seems to
5 me that the whole question of copyright infringement has to
6 come down to whether the contract was properly terminated;
7 and if it was properly terminated on March 30th of 2016,
8 or -- it's not even clear to me whether it should be stated
9 as March 30th, or March 31st.

10 But if it were properly terminated on March 30th
11 of 2016, then it would be really tough for the defendants
12 to prove they didn't infringe.

13 MR. HINDERAKER: If it was properly terminated,
14 Federal infringed.

15 THE COURT: Right. I understand your, right,
16 argument about ACE.

17 But I agree with Mr. Metlitsky that the theory of
18 the case and the -- Federal's infringement comes down to
19 the propriety of the termination, sort of full stop. ACE's
20 infringement may or may not, but -- and so the question of
21 expanded use, which was the basis or a basis for
22 termination -- well, violation of 10.8, which was the basis
23 for the termination, occurs or doesn't occur before, on or
24 before March 30th.

25 So why wouldn't -- so I'm not --

1 MR. HINDERAKER: It's the catch-22 of it, the
2 nanner, nanner problem. I follow your logic as well, Your
3 Honor. I follow your logic. And I'm really keying off of
4 where Judge Wright is saying, well, if you do read it that
5 other way --

6 THE COURT: Their way.

7 MR. HINDERAKER: -- their way, the defendants'
8 way, then they should be held to the truth of, to the truth
9 of the proposition that they did not expand use. And I'm
10 not trying to run away from the complications that that
11 presents. It does.

12 THE COURT: Right.

13 MR. HINDERAKER: On the other hand, being able to
14 say one thing and then do another without the consequences
15 in the case is troublesome.

16 THE COURT: Let me just think for a second.

17 Is the, the quality of the expanded use, okay --
18 you understand what he's getting at, right?

19 MR. METLITSKY: I understand the argument. My,
20 first of all, well, I understand the argument. I think the
21 breach of contract standard that he's stating for what they
22 have to prove is wrong because there's this unreasonably
23 withheld consent piece of it, and we can't ask for consent
24 because they've improperly terminated the license.

25 So there's that complication to the contract

1 claim. There's a very significant complication -- again,
2 I'm not sure that they would be making a --

3 THE COURT: Let me interrupt you. I've just in
4 my mind figured out how I want to articulate it.

5 MR. METLITSKY: Okay.

6 THE COURT: They want to make sure that you're
7 not going to argue that no expanded use was made before the
8 termination, so they improperly terminated the contract
9 and, yeah, we expanded use after it was terminated, but
10 what else were we going to do? We don't have anybody we
11 can ask.

12 In other words, they don't want you to make kind
13 of the argument that you're implicitly making now, which
14 is, we were well within our rights to expand use after
15 March 31, 2016, because we didn't have anybody to ask.

16 MR. METLITSKY: That was not the argument that I
17 was trying to make. I think our argument is that we never
18 expanded use.

19 THE COURT: Right.

20 MR. METLITSKY: Right. But their argument is
21 that we did, right?

22 THE COURT: Right.

23 MR. METLITSKY: And they say that was a breach of
24 contract. Let me just give you an example.

25 THE COURT: Right.

1 MR. METLITSKY: Let's say we expanded use that
2 had the quantitative effect of .001 percent on whatever
3 their relevant metric is. I think it would be unreasonable
4 in that circumstance to withhold consent. But you
5 can't ask for consent -- there was no opportunity to ask
6 for consent because the license had already been
7 terminated.

8 I'm just saying that what they would have to show
9 is not just that there was expanded use, but that it would
10 have been unreasonable to withhold consent if we had asked.
11 That's just what the contract says, right?

12 THE COURT: Right.

13 MR. METLITSKY: Yeah, that's all.

14 MR. HINDERAKER: The telephone number at FICO is,
15 didn't change. Email addresses are still the same. If
16 they wanted to contact FICO after they expanded the use, it
17 works. They can. This notion that the license agreement
18 is no longer and so therefore they can't pick up the phone,
19 obviously not true. So --

20 THE COURT: Yeah.

21 MR. HINDERAKER: And to presume that whatever we
22 do would be unreasonable gets the cart in front of the
23 horse. First you have to ask and then we have to act
24 reasonably.

25 THE COURT: Right. And I think it seems to me

1 the way through this issue is to -- what you're raising in
2 a sense is a, you don't want them to make the prematurity
3 argument, you terminated prematurely. And if you follow
4 that, you -- so it seems to me that the way through this is
5 that, part of your argument is they received the right --
6 they are three times larger.

7 They received the right to process the business
8 of another business entity, and in fact they did that. And
9 the fact that they, quote, the "they did that" occurred
10 after March 30th of 2016 can't be used as a way of saying,
11 even if FICO's theory is right, at the time they terminated
12 the contract, the expanded use had not been made.

13 MR. HINDERAKER: That would work.

14 THE COURT: Am I -- is this -- it's a little
15 complicated.

16 MS. GODESKY: Well, our -- one of our bad faith
17 arguments is, they rushed to terminate with no evidence of
18 expanded use, right? That's our second theory of bad
19 faith.

20 And so we do absolutely intend to argue that
21 Mr. Carretta sent the notice of termination without a
22 stitch of evidence or an inkling of expanded use, whether
23 it be under Federal's view of the world, measured by
24 applications, or whether it be measured by any other
25 metric, right?

1 I mean, I asked all of their witnesses: Did you
2 have any evidence of any expanded use? No. No. No. And
3 so that is absolutely our bad faith theory, and we should
4 be able to argue it.

5 MR. HINDERAKER: Doesn't that, Your Honor, go to
6 the very point that you're making? I guess it was a
7 premature -- I guess it was a premature termination because
8 we didn't get around to expanding the volume of use until
9 after March 30th.

10 THE COURT: Well, but -- yeah, I -- you, Federal,
11 your argument about the rush to judgment -- well, you know,
12 I don't know how we -- I understand the debate that's going
13 on.

14 I don't know that you guys are talking in the
15 same language exactly. You're absolutely right to make
16 your rush-to-judgment argument.

17 What I'm trying to say is -- let me ask it this
18 way. Your we didn't expand use argument --

19 First of all, you take the position that up until
20 2020 we never expanded use, correct?

21 MS. GODESKY: Correct.

22 THE COURT: And that was because the Blaze
23 Advisor software was used in the same applications, running
24 in the same fashion. You're not suggesting that more
25 policies didn't run through those applications that touched

1 Blaze but that it's the same use.

2 MS. GODESKY: Correct.

3 THE COURT: And the rush to judgment in a sense
4 is not only -- it's not that we hadn't expanded use at that
5 time. It's that we told them what we were going to do.
6 That's not expanded use. They didn't listen to the
7 evidence or wait and see. They just said, nope, that's
8 expanded use and you are done.

9 MS. GODESKY: Correct. I mean, I think it's
10 both, right? I mean, they didn't have any evidence of
11 expanded use under either Federal's metric of application
12 by application or whatever metric we're going to hear from
13 FICO, number of policies, number of writing companies,
14 whatever it is.

15 When Mr. Carretta sent that breach letter, he did
16 not have evidence of expanded use under any metric. And
17 then I would say, but the only metric that matters, right,
18 is my argument would be, number of applications, and that
19 was never expanded.

20 THE COURT: And I think their metric is -- the
21 way I'm trying to cut this baby is, their argument is you
22 received the right to process the business of an expanded
23 entity and whether you began that process on day 1 or day
24 30 doesn't matter. It's the fact that you've gotten that
25 right, and so the application measure is not the right

1 measure of expanded use.

2 MS. GODESKY: Sure.

3 THE COURT: And so I guess what I'm trying to get
4 to is, they get to say, when we heard about the merger and
5 we had our discussions, this is what we -- this is how we
6 understood expanded use and sure and begorrah, it sure
7 happened.

8 MS. GODESKY: They can say that, Your Honor, but
9 I don't think they have any witnesses who have said that.
10 That may be Mr. Hinderaker's argument. But when I asked
11 the witnesses if they had evidence of expanded use, they
12 all said no.

13 They didn't say, you know, well in our view
14 evidence of expanded use is additional writing companies.
15 We knew that -- I mean, that's just not the testimony. I
16 understand that's the argument, but it's not the testimony.

17 THE COURT: There was some testimony to the
18 effect, I think, that -- there was a suggestion that the
19 right to process the business of an expanded entity is
20 expanded use.

21 MR. HINDERAKER: There was that, and there was
22 the, there was the proposal that the defendant sent that
23 February 25th.

24 THE COURT: Right.

25 MR. HINDERAKER: We're going to do whatever we

1 want, we're going to change the applications as ever we
2 wish. Mr. Carretta testified to that. Mr. Schreiber
3 testified to that. He called it FICO, the sucker.
4 Mr. Waid testified to that.

5 THE COURT: Right. No. I get all that.

6 All right. I don't see a way of doing this on
7 the verdict form per se. I see this as a setting some
8 limits on arguments of counsel and how we approach it.

9 I think, Mr. Hinderaker, I mean, first of all,
10 you can say that expanded use is the right -- is receipt of
11 the right to process, you know, a larger entity's policies.

12 MR. HINDERAKER: Sure. That's the beginning of
13 our case.

14 THE COURT: Right.

15 MR. HINDERAKER: That's the beginning.

16 THE COURT: And that you -- and the proposal, you
17 know, offered another version of that.

18 And isn't the testimony that, that Federal
19 started processing the policies of the ACE writing --
20 Legacy ACE writing companies?

21 MR. HINDERAKER: That's our -- that's our, that's
22 our case. Exactly so. And there is, you know, we spent
23 some time.

24 THE COURT: I mean there's --

25 MR. HINDERAKER: Legacy companies running through

1 the applications and additional volume and additional
2 revenue.

3 THE COURT: Right.

4 MS. GODESKY: The evidence based on the
5 interrogatory responses is that Legacy ACE policies ran
6 through one application the CUW-IM application. And based
7 on the interrogatory response, that started happening in
8 2016.

9 THE COURT: Okay. So I guess what we're trying
10 to get at it is this: You're both free to make your
11 arguments.

12 Your point is, they rushed to judgment. There
13 was never a threat of expanded use, and there never was
14 expanded use, and they had no evidence of it.

15 MS. GODESKY: Yes. With the bad faith and on the
16 actual breach claim our argument is, under the language of
17 10.8, we didn't have to do anything in the event of an
18 acquisition unless we intended to expand use, right?

19 THE COURT: Right.

20 MS. GODESKY: And we didn't, so there was no
21 breach.

22 THE COURT: Right.

23 MS. GODESKY: And then in the world of bad faith,
24 we told them we're not expanding use, and yet they
25 terminated despite the lack of evidence, right? That's our

1 argument.

2 THE COURT: Right. And they get to argue, no,
3 we -- they get to argue there was expanded use. They got
4 this right to process policies. Their proposal proposed
5 expanded use, and in fact as we know, they did start
6 processing Legacy ACE policies.

7 I think those two things are, they're different.
8 It's going to be hard to say they both happened, right? I
9 mean, that they're both right, but I think you can both say
10 them.

11 MR. HINDERAKER: Sure.

12 MS. GODESKY: I think that's what we've both been
13 saying.

14 MR. HINDERAKER: That's our intention. This
15 whole long conversation started with tying everything to,
16 you know, to the specific date of March 30th.

17 THE COURT: Right. And maybe the way to, you
18 know, maybe the way to say it is, did FICO prove that
19 Federal breached Section 10.8 of the license agreement?
20 Stop.

21 MR. HINDERAKER: Period, yeah.

22 THE COURT: Did Federal properly terminate the
23 license agreement on March 30th?

24 MR. HINDERAKER: Or did FICO properly
25 terminate --

1 THE COURT: Did I say Federal? I am sorry.

2 And so take out -- that would move the
3 instruction down below question three that's now on the
4 verdict form, but take care of, I think, the issue.

5 MS. GODESKY: Yes.

6 THE COURT: Okay. Mr. Hinderaker.

7 MR. HINDERAKER: I think so. Could I see --
8 well --

9 THE COURT: Yes.

10 MR. HINDERAKER: -- when we see it again, let's
11 look at that again.

12 THE COURT: Right. Okay. We'll make that
13 change, and you can see it again.

14 And then how about questions four, five and six,
15 assuming that structural change works.

16 MR. HINDERAKER: I think on four -- sorry -- I
17 think on four the -- it's just a matter of it being
18 confusing to us. If you find FICO properly terminated the
19 license agreement, please enter the amount of damages FICO
20 incurred as a result of Federal's breach of the license
21 agreement.

22 I think it should say "after" not "prior to."

23 THE COURT: Well, and -- see, that's the other
24 question. There's an allegation -- I'm fine with "after."
25 I'd rather "after." It make my life easier. But before

1 there are allegations that they breached the contract prior
2 to the date of termination.

3 And are you seeking damages for that? Life's a
4 lot easier if you don't. It's fairly small, obviously.

5 MR. HINDERAKER: Well, given that "client" means
6 Federal and given that the foreign insurance companies are
7 affiliates --

8 THE COURT: It would only be the consultants.

9 MR. HINDERAKER: And I'm not, we're not -- the
10 only issue with the consultants is that it was the basis
11 for the termination. There's not a separate damages
12 claim --

13 THE COURT: Okay.

14 MR. HINDERAKER: -- relative to the consultants,
15 Your Honor.

16 THE COURT: All right. So then we'll change that
17 to after March 31st?

18 MR. HINDERAKER: Yeah, that's the damages period
19 issue.

20 THE COURT: And then -- okay. So do we want
21 to -- in light of that change, four and six are now asking
22 the same thing.

23 MR. HINDERAKER: Four and six.

24 THE COURT: So that their answers should be
25 consistent.

1 MR. HINDERAKER: They should be, yes.

2 THE COURT: Okay.

3 MR. HINDERAKER: Actual damages under copyright
4 and lost license fees under contract should be the same
5 amount for this element.

6 THE COURT: Okay.

7 MR. METLITSKY: And, Your Honor, I think the same
8 is true of three and five, if I'm not mistaken. If their
9 termination is proper, then they should say yes to
10 copyright infringement. If the termination is improper,
11 they should say no, right?

12 THE COURT: Right.

13 MR. HINDERAKER: And we would be fine with that
14 because it does -- if they find that termination is proper,
15 they don't have to -- in our judgment, you should instruct
16 them by the form that that is copyright infringement.

17 THE COURT: Well, right.

18 MR. METLITSKY: I'm just suggesting in the
19 instruction you should say the same thing for both.

20 THE COURT: Right. There's actually -- I
21 understand.

22 MR. METLITSKY: Yeah.

23 THE COURT: Okay. Part two. Okay. Hearing
24 nothing --

25 MS. KLIEBENSTEIN: Hold on just a second, Your

1 Honor.

2 THE COURT: Say, everyone, we're going to take a
3 brief break. Our poor court reporter has been going at it
4 for a long time.

5 (Recess taken)

6 THE COURT: All right. What was the issue
7 relative to question four?

8 MR. HINDERAKER: So if you find that FICO
9 properly terminated the license agreement, please enter the
10 amount of damages FICO incurred as a result of, and I think
11 it should say not as as a result of the Federal breach. It
12 should say as a result of -- just as it does in five -- as
13 a result of the use of Blaze Advisor.

14 Kind of confusing to say what's our damages
15 because Federal breached, I think --

16 THE COURT: Right.

17 MR. HINDERAKER: So as a result of Federal's use
18 of Blaze Advisor after March 31st.

19 MR. METLITSKY: I think that's okay with us, so
20 long as it says "after," you know, instead of "prior to."

21 THE COURT: Right.

22 MR. METLITSKY: Can we just go back to one for a
23 second?

24 THE COURT: Yeah.

25 MR. METLITSKY: I think we would just add at the

1 end by sharing the Blaze Advisor software with third-party
2 consultants or something like that.

3 THE COURT: Yes, we have that. I didn't realize
4 that that wasn't in this version that was given to you, but
5 we have that language.

6 MR. METLITSKY: I now know what you meant when
7 you said I would have solved that problem in the verdict
8 form.

9 THE COURT: Yeah, I have put that in.

10 MR. METLITSKY: Okay.

11 THE COURT: Okay. With those changes -- and I
12 just, so you guys know what's coming, so on question five I
13 put a parenthetical note, If you answered yes to question
14 three above, you must answer yes to this question.

15 Now it's a little awkward because if they answer
16 no, they're never going to see this, but that's fine.

17 And then at the bottom of six, I've added back in
18 the note, Your answer to question four and six must be the
19 same.

20 MR. METLITSKY: Great.

21 THE COURT: Part two. Any concerns?

22 MR. HINDERAKER: We're good, I think.

23 MR. METLITSKY: Yeah, we're okay.

24 THE COURT: Okay. Part three. Profits. I
25 suppose somebody's going to object to the bolding of the

1 words "revenue" and "profits."

2 MR. HINDERAKER: Well, we didn't think about
3 that.

4 THE COURT: Sorry I raised it.

5 MR. METLITSKY: We would object to at least in
6 part for the reasons we discussed below, especially because
7 it says "contributed at least in part."

8 THE COURT: Right. I understand.

9 MR. METLITSKY: That's double counting there.

10 MR. HINDERAKER: And can we move to ten then?

11 THE COURT: Sure.

12 MR. HINDERAKER: So what --

13 THE COURT: Take out "directly."

14 MR. HINDERAKER: Take out "directly" and add "at
15 least in part."

16 THE COURT: I know you don't want the "at least
17 in part."

18 MR. HINDERAKER: Take out "directly."

19 THE COURT: I am going to take out the "at least
20 in part" because of the word "contributed."

21 MR. HINDERAKER: Up in nine or --

22 THE COURT: Yeah, I'm going to take it out in
23 nine. Well, just because the word "contributed" implies at
24 least in part.

25 MR. HINDERAKER: Well, can you put "at least in

1 part" in parenthesis then?

2 THE COURT: I think it really does -- it
3 contributed. It made a contribution. It's just in part.

4 MR. HINDERAKER: Okay.

5 THE COURT: And even though -- I think I will
6 take out "directly," though it is in the instruction
7 because that is the law but --

8 MR. METLITSKY: So long as -- I mean, we prefer
9 "directly" in there. Can we argue the --

10 THE COURT: Yes. Yes.

11 Okay. 11, I've changed it to say, not taken into
12 account by computing FICO's actual damages in your answers
13 to questions four and six, because now we've reinstituted
14 that.

15 MR. HINDERAKER: We have some suggestions about
16 number 11. And our suggestions in many ways -- our
17 suggestions are built from the instruction regarding
18 profits and defendants' burden of proof on page 26.

19 THE COURT: Okay.

20 MR. HINDERAKER: So this is what we suggest on
21 number 11: Enter the amount of profits to be awarded to
22 FICO -- we didn't say if any because that's already in the
23 revenue line in 10, but --

24 THE COURT: Yeah, I'm just, so you all know, I
25 had that in some and not in others. I'm just going to take

1 it out of all of them.

2 MR. HINDERAKER: Okay. So enter the amount of
3 profits to be awarded to FICO, calculated by reducing the
4 revenue from number ten by the amounts, if any, defendants
5 have proven are costs associated with that revenue and by
6 the amounts, if any, defendants have proven are
7 contributions to that revenue from other factors.

8 So we're not trying to change things, really, or
9 at all. We're trying to conform with the instructions on
10 26 and to be clear that there is the issue of the costs,
11 and separate from the issue of the costs, the issue of the
12 contribution of factors other than infringement. Yeah, I
13 would be happy to hand you what we wrote.

14 MR. METLITSKY: Your Honor, we would, we would
15 just object to -- that's already in the instruction. We
16 don't need to reinstruct, right?

17 So, you know, certainly wouldn't include "if any"
18 in the discussion of costs.

19 THE COURT: Yeah, "if any" isn't coming in.

20 MR. METLITSKY: But no, I don't think we -- I
21 don't see any -- we don't do that in any other of the
22 questions where you just like rewrite the instruction into
23 the question. The jury's going to know how to figure that
24 out because you're going to instruct them on it.

25 THE COURT: By that logic, Mr. Metlitsky,

1 shouldn't this question just say: Enter the amount of
2 profits.

3 MR. METLITSKY: Well, no.

4 THE COURT: Hang on.

5 MR. METLITSKY: Oh, I'm sorry.

6 THE COURT: That are not taken into account by
7 computing FICO's actual damages.

8 MR. METLITSKY: Yeah. We'd be fine with that.

9 MR. HINDERAKER: And then that keys us back into,
10 into 26. I think we're fine with that too.

11 THE COURT: Okay.

12 MR. HINDERAKER: Yeah, we're good.

13 THE COURT: Okay. Federal's claims, part four.

14 MR. HINDERAKER: Nothing from the plaintiff, Your
15 Honor.

16 MR. METLITSKY: Your Honor, we leave it up to the
17 court, but if the, I think, if the jury finds that their
18 termination was proper, they can't find for us.

19 THE COURT: Correct.

20 MR. METLITSKY: Okay. So however you want to
21 deal with that, that's fine. We do not want -- it's very
22 hot. We don't want to do this.

23 THE COURT: Right. No. I'll make sure that that
24 instruction is taken care of.

25 So with that, what we'll do is, we'll make these

1 final edits, and we'll circulate them to the parties
2 imminently. If anybody, if we've gotten it wrong or
3 there's a concern, just let us know, and we'll meet before
4 court at 8:00.

5 I'm just going to tell you what I've decided to
6 do on the instructions that we had ongoing disputes about.

7 On breach of contract, materiality, I am going to
8 leave it the way it is. I understand your argument. I
9 don't believe this is law of the case. So that's what I'm
10 going to do.

11 On number, page 16, construction of the license
12 agreement, at the end of that second paragraph, here's what
13 I've drafted: "Therefore, use of Blaze Advisor by Chubb
14 Canada, Chubb Europe, and Chubb Australia, before the
15 license agreement was terminated, was not a breach of the
16 license agreement."

17 And then on paragraph -- or on profits,
18 plaintiff's burden, as I've indicated, I'm not going to put
19 in "at least in part." I am going to confirm. I'm going
20 to reread *Andreas*, and I am likely to leave "causal nexus"
21 in.

22 So we also have to draft an instruction, unless
23 you already have it drafted, Mr. Metlitsky, for us to
24 modify about factors that the jury may consider.

25 Do you have one already drafted?

1 MR. METLITSKY: We do. What's the best way to --

2 THE COURT: Do you have it in paper?

3 MR. METLITSKY: I do, actually.

4 THE COURT: Hand it up.

5 MR. METLITSKY: Or I could actually, not really,
6 but I can get it in paper.

7 THE COURT: Well, just email it to the court then
8 and -- email it to Miriam.

9 MR. METLITSKY: I might have it in paper. If I
10 have it in paper, I will.

11 THE COURT: Yeah. And we will modify it and
12 circulate it.

13 MS. GODESKY: May I ask for guidance on just one
14 issue?

15 THE COURT: Sure.

16 MS. GODESKY: I don't want to run afoul of the
17 court's directives. And I understand that there's been a
18 directive not to highlight the court's ruling on the
19 territorial issue in connection with bad faith. Completely
20 understood.

21 I would -- and I don't intend to make a big show
22 of it, but I do think in discussing the damages piece, I do
23 need to be able to reference, you know, something along the
24 lines of, as you've heard from the judge, there's been a
25 finding that use by Chubb Australia, Chubb Europe and Chubb

1 Canada could not constitute a breach of contract.

2 In framing, you know, why that number, whatever
3 it is, once we extract, you know, the foreign affiliates
4 values from that \$50 million number, I just feel like I
5 need to frame that for the jury because they're going to be
6 very disoriented after having spent weeks hearing about
7 that issue in dispute, so I just want to make sure that's
8 clear.

9 THE COURT: Yeah. I think that's appropriate.

10 Mr. Hinderaker, does that give you heartburn?

11 MR. HINDERAKER: Yeah.

12 THE COURT: Tell me why.

13 MR. HINDERAKER: I think, one, I don't share the
14 premise that there's any confusion or any, any confusion to
15 the jury.

16 THE COURT: I don't share the premise that
17 they've necessarily written down any of these numbers.

18 MR. HINDERAKER: I fully agree. I think that the
19 purpose of this mention is to talk about the, you know, the
20 merits of FICO's case. It gives that implication. I think
21 that, as we've spoken before, the closing arguments and the
22 numbers are going to be the numbers that are in the case
23 now, and the jury's going to receive those, and that will
24 be the framework.

25 So I just reject the premise, and I think its, I

1 think that its real purpose is to go to the merits of
2 FICO's case, not an explanation that isn't necessary.

3 MS. GODESKY: Your Honor?

4 THE COURT: Go ahead.

5 MS. GODESKY: I will say, it's complicated by the
6 fact that I'm going first, right? So if they were going
7 first and Mr. Hinderaker was going to present his, let's
8 call it a, \$25 million number, then I'm attacking, you
9 know, what's been presented.

10 But we spent weeks in this case talking about
11 breach by the Federal affiliates in those three countries,
12 and they've heard, you know, \$50 million number. So
13 they're going to be wondering why is she talking about a
14 different number that doesn't include these affiliates,
15 right?

16 And so it's just very disorienting, and I'm not
17 intending to, you know, jump up and down and say, aha,
18 they've already lost one claim. I mean, that's really not
19 what I'm going to do.

20 THE COURT: So well, here's what I think. I
21 think when you share the number, which you're still going
22 to do, this will get taken care of in combination with my
23 instruction so -- but it still leaves me confused.

24 It seems to me that the actual, the number, and
25 maybe I, God knows, I may well have missed it, but the

1 actual -- the hypothetical number is a going forward
2 number, basically from 2016 forward.

3 MS. GODESKY: No. What they presented was in
4 those foreign affiliates applications, ten years of use.
5 Those were the numbers went up on the charts, ten years
6 going back to '06, because that's when --

7 THE COURT: I see.

8 MS. GODESKY: Yes.

9 THE COURT: I remember that now.

10 MR. HINDERAKER: The other element of it, Your
11 Honor, is that you recall we never -- it was clear we
12 shouldn't, and we never did.

13 THE COURT: Connect.

14 MR. HINDERAKER: Any of those dollars as FICO's
15 damages claim. The first time the jury is going to hear,
16 well, actually the jury isn't even going to hear that
17 tomorrow.

18 They're just going to hear a beginning place.

19 THE COURT: Right.

20 MR. HINDERAKER: So, you know, what I heard
21 counsel say is that the jury has an expectation that FICO's
22 claim is. Well, FICO isn't going to tell the jury. We're
23 going to be consistent with what our guidance already is.
24 We're not going to contend a particular number.

25 We're going to go through the methodology again,

1 because it's the jury that has to decide that actual, that
2 actual number.

3 THE COURT: Right. I think the way I would
4 prefer you to handle it is to say that number, whatever
5 number you're going to present or whatever you are going to
6 say, covers the use from 2016 forward. And that's what
7 happens when I talk too slowly, I forgot the first half of
8 what I was going to say.

9 MR. HINDERAKER: And that is consistent with your
10 instructions as well.

11 THE COURT: No. I understand. I was going to
12 say, you could say something to the effect that the period
13 of use is 2016 forward as --

14 MS. GODESKY: Which the judge has instructed you
15 is the only period relevant to any actual damages in the
16 case, something like that?

17 THE COURT: Well, is the only period of use at
18 issue.

19 MS. GODESKY: Sure, which as the judge has
20 instructed you is the only period of use you need to be
21 concerned about.

22 THE COURT: Right. And -- yes. You okay with
23 that?

24 MR. HINDERAKER: I am, Your Honor.

25 THE COURT: Okay.

1 MR. HINDERAKER: Now it's neutral.

2 THE COURT: Yeah.

3 MR. HINDERAKER: It's just factual what the
4 instructions are.

5 THE COURT: Understood.

6 Okay. Get out of here, right?

7 Thanks, everyone. We'll see you in the morning.

8 MR. HINDERAKER: Thank you, Your Honor.

9 MS. GODESKY: Thank you, Your Honor.

10 (Court adjourned at 5:37 p.m., 03-07-2023.)

11

12

* * *

13

14

15

16

17

18

19

20

21

22

23

24

25

We, Kristine Mousseau and Renee A. Rogge, certify
that the foregoing is a correct transcript from the record
of proceedings in the above-entitled matter.

Certified by: /s/Kristine Mousseau
Kristine Mousseau, CRR-RPR
/s/Renee A. Rogge
Renee A. Rogge, RMR-CRR